



## The legal status of the Sulha in the criminal law of the State of Israel.

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**UNIVERSITY OF DERBY**

**THE LEGAL STATUS OF THE SULHA IN THE  
CRIMINAL LAW OF THE STATE OF ISRAEL**

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A Work Based Project (WBP)

Submitted to the University of Derby

in Partial Fulfilment of the Requirement for the Degree

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## **Glossary**

**ADR** – Alternative/Appropriate Dispute Resolution, is "a term generally used to refer to informal dispute resolution processes in which the parties meet with a professional third party who helps them resolve their dispute in a manner that is less formal and often more consensual than is done in the court".(Spangler, 2003).

**BLPS** - Basic Law: President of the State 1964.

**CL** - Courts law 1984.

**CRFPL** - Conditional Release from Prison Law 2001.

**CPLEPA** - Criminal Procedure Law (Enforcement Powers: Arrest), 1996.

**CPL**- Criminal Procedure [Consolidated Version] Law, 1982.

**DESI** - Declaration of Establishment of the State of Israel.

**J'aha** - The Sulha Committee.

**JLJPT** - Juveniles Law (Judgment, Punishment, and Treatment) 1971.

**PL** - Penal Law, 1977.

**PO** - Prisons Ordinance 1971.

**SICOE 2003** - The State Investigative Commission on the October 2000 Events.

**Sulha** - A conciliating procedure, external to the domain of formal law, for settling disputes (mostly blood disputes), between the offender and his family or his 'Hamula' (tribe, extended family), and the victim and his family or 'Hamula' which was caused due to a deviation from the standard of common moral codes and from the standards of normative criminal law.

Its objective is to repair the damages caused to the victim and the community, which had been caused by the offender, to make peace between the rival parties and to strengthen the social solidarity.

## **Abstract**

The research investigated the legal status of the Sulha in the criminal law of the State of Israel. This research is a qualitative-interpretative-exploratory single case study. Its main goal was to create scientific and professional knowledge with practical ramifications for the judicial world, as well as to develop a new theory and model of the Israeli criminal process that would allow for the incorporation of Sulha within the Israeli criminal process. The qualitative data collection methods and sources used were structured interviews, a Delphi survey, documents, the researcher's professional experience and a personal diary. The 16 interviewees were professional, credible, trustworthy and expert people in their field. Seven (7) experts in the field made up the Delphi panel. The research met all of its goals and objectives of the study questions: What is the legal status of Sulha in Israeli criminal law? How can the Sulha be incorporated in Israeli criminal law, and what contribution would Sulha make in this respect? What action is required for Sulha to be incorporated in Israeli criminal law? The findings showed that criminal statutory laws, Israeli courts, and parole committees do not recognize the Sulha as an alternative conflict settlement venue in criminal cases. The findings showed that Israeli courts and parole committees have two principal approaches to the question of the legal status of the institution of Sulha in Israeli criminal law. One approach refuses to grant the institution of Sulha any binding legal status in Israeli criminal law, while according to the other approach Sulha can serve as a consideration in a person's favor, but not as a decisive consideration, and certainly not one that binds the courts or parole committees. The findings showed that it would be possible to enhance the Israeli criminal law by incorporating the Sulha within the criminal law. Incorporation of the Sulha in the Israeli criminal law would enhance and improve the Israeli criminal law by achieving speedy justice, by reducing the caseload of the courts, by increasing public confidence in the criminal process and the judicial activity, by reducing the frequency of erroneous judgments, by achieving restorative justice, by promoting reconciliation and by facilitating the achievement of peace between the parties affected by the criminal act. Further, the Sulha could contribute greatly to reconciliation and to the installment of peace in Israeli society and achieves restorative justice.

A bill (law draft) has been prepared for the incorporation of the Sulha in the criminal law in Israel. The researcher is convinced that the Knesset (Israeli Parliament) will approve it as soon as possible.

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Finally, I dedicate this study to every human being who loves humanity, truth, justice and peace.

## Introduction

### 1.1. Preamble

The present study will examine the legal status of the Sulha in the criminal law of the State of Israel. The meaning of the word Sulha is *peace*. Sulha is a conflict settlement mechanism implemented, generally within the context of blood feuds, between the offender and the members of his family or tribe (clan), on one hand, and the victim of the offense and the members of his family or tribe (clan), on the other, in the wake of behavior that deviates from the standard represented by the moral principles pertaining in society or the commission of a criminal offense. The aim of the Sulha process is to restore the injuries done to the victim of the offense and to the community by the offender; instill peace between the rival parties, i.e. the offender and the victim; and buttress social solidarity. The Sulha process has held sway in the social and cultural fabric of the Arab minority in Israel as well as in Arab states (Elabadi, 1982; Ginat, 2000; Elzagot, 2000).

Sulha is a conflict settlement mechanism that resembles those of mediation and conciliation (Jabour, 1996; Hlahel, 2000; CrimR (zef) 2559/03 *State of Israel v. Zahwa*, Takdin Mag. 4 [2003], 15397).

The State of Israel is defined as a Jewish and democratic state (EA 1/88 *Naiman v. Chariman of the Central Committee for the 12<sup>th</sup> Knesset*, IsrLR 4 [1998], 177, 188; DESI, 1948; BLHDL, section A1; BLFO, section 2). Within it there are three branches of government: the legislative branch (the Knesset), the executive branch (the administration), and the judicial branch. There is no formal constitution in Israel. Instead, there are basic laws, which together comprise something of an unfinished constitution. The three branches of government derive their power from the basic laws, which in turn derive their power from the people—the sovereign. There is no clear-cut separation between the branches of government. They interrelate reciprocally in that each branch checks and balances the others (HCJ 5364/94 *Velner v. Chairman of the Labor Party*, IsrLR 1 [1995], 758, 790).

At the start of 2015, the State of Israel was home to 8.345 million inhabitants, including 6.251 million Jews (74.39%); 1.730 million Arabs (20.7%); and 364,000 others (4.4%; CBS, 2014).

There are many perceptions of democracy, ranging from the idea of a people's democracy to that of a Western democracy, from formal democracy to substantive democracy, and even within the realm of substantive democracy there are various views on the essence of what democracy is (Dahl, 1998).

Democracy is based on two fundamental elements: sovereignty of the people (the formal element), and the rule of values, fundamental principles, social aims, and decent behavior, e.g. division of powers between the branches of the state, the rule of law, independence of judges and the judiciary, human rights, justice and morality, public welfare and security, reasonableness, and good faith (Barak, 2004; Post, 1998).

True democracy is communal democracy (Dworkin, 1990).

Democracy, as opposed to the mere rule of the majority, also includes within it the rule of fundamental values and human rights as embodied in a constitution (CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, IsrLR 4 [1995], 221,423).

When a democracy is characterized by a formal constitution and judicial supervision of the constitutionality of the law, it is termed a constitutional democracy (Eisenstat, 1999).

In human society, the consent, as a normative principle, makes communal life possible. Justice is one of the ways in which the state reacts to social deviance. Penal law is a part of the social defense and control mechanism that reflects the ways in which organized society protects the values that are basic and essential to its proper functioning and to its ability to develop as desired (Shoham and Shavitt, 2004).

The objective of the judicial process is to achieve justice; the search for truth is the means of achieving justice (Barak, 2004; HCJ 6650/04 *X v. Netanya Rabbinical Court*, IsrLR 1 [2006], 581).

Yet discovery of the truth is not always possible, and the judicial process is not an appropriate means of resolving every conflict that arises in society. There are also appropriate alternative means of settling conflicts that occur in society, such as mediation, conciliation, arbitration, and so forth (Spangler, 2003; Meroni, 1999).

Sulha is one means of resolving conflicts that occur in society.

It is indeed true that the independence of a state's judges and its judiciary and respect of the human rights of all human beings are important elements of democracy (Barak, 2004; Breyer, 1996; Stevens, 2005; *Beanregand v. Canada* [1986] 2 SCR 56, 70; Weinrib, 2001).

Under democracy, every person is entitled to the recognition of his value as a person, as well as to the sanctity of his life and his freedom (Pikis, 2000).

Three judicial models prevail in the modern world: the inquisitorial model (inquisitorial system), the adversarial model (adversarial system), and the popular justice model (popular justice system; Vogler, 2005).

The judicial model used in the Anglo-Saxon world and in Israel is the adversarial model. The essence of this model is a binary system, one of "either/or," such that the legal process is a zero-sum game (Marshall, 1972; Eisenberg, 1976). Generally speaking, the trial is conducted by the parties involved and the judge is a passive actor. The parties take opposing, polar positions, and the outcome of the trial, similarly, typically is that one winner and one loser are designated (Alroai, 1993). Each stakeholder's aspiration is to win the trial.

The application of judicial rule, too, is controlled by a binary principle: the judge is limited to choosing the appropriate mechanism for a given case as established by the law (Alroai, 1993).

The trial likewise does not take into consideration many nontangible interests, e.g. mutual respect, the need for acknowledgement and a feeling of personal significance, the need for equality and security, etc. (Risnik, 1982).

This study is an exploratory one. Its goal was to describe and explain the legal status of Sulha in Israeli criminal law and thus to create scientific and professional knowledge with practical ramifications for the judicial world, as well as to develop a new theory and model of the Israeli criminal process that would allow for the incorporation of Sulha within the Israeli criminal process. The goal of the qualitative study is to understand and interpret social interactions (Johnson and Christensen, 2008; Lichtman, 2006). Public legal discourse reinforces the view that criminal law cannot continue to be the only available response to an offense: there is a place for criminal mediation/conciliation (Sander, 1985).



The Sulha process, as those associated with restorative justice, differs from the formal, adversarial criminal process that holds sway under the Israeli legal system in ways both fundamental and procedural. The formal criminal process is concerned principally with determining whether criminal law has been breached and by whom, and with penalizing the lawbreaker. It is not intended to resolve the conflict between the offender and the victim that has been engendered by the offense. The formal criminal process is an adversarial one the parties to which are the state and the offender. During the process, a determination is reached regarding the guilt of the offender, and his sentence is set by a decision of the court.

Of the several goals of sentencing, the central ones are punishment for the sake of recompense, censure, and personal and general deterrence. Secondary to these aims are those of incapacitation, rehabilitation, and compensation. As a rule, criminal justice is not intended to provide solutions for the needs of the victim of the offense or to restore peace to the community (Hlachel, 2002; Jabour, 1996).

Unlike the formal criminal process, the Sulha process resembles a restorative justice process, purposed as it is to permit the victim of the crime, the offender, and representatives of the community to arrive at a consensual solution to the conflict that resulted from the criminal act, and to attain restoration of injuries. The Sulha agreement, which enjoys the consent of the parties to the crime, is more likely to be fulfilled than a verdict handed down by the court (Farkash, 2002).

The institution of Sulha champions consensual restoration of the injury arising from the criminal act, thus empowering both the individual and the community. Sulha can serve to bring a critical additional element to the criminal justice system and to enhance both its efficiency and its role in democratic society. Professionals in the field have called for adoption of the Sulha process in the Israeli criminal justice system (Shapiro, 2006; Hlachel, 2002; CrimR (Zef) 2559/03, ad loc.).

The three research questions are as follows:

1. What is the legal status of Sulha in Israeli criminal law?
2. How can the Sulha be incorporated in Israeli criminal law, and what contribution would Sulha make in this respect?

### 3. What actio is required for Sulha to be incorporated in Israeli criminal law?

The data concerning the first question were collected from legal sources (e.g. legislative resources, including statutes and acts; judiciary resources, including court judgments and decisions and parole decisions; professional and academic literature; and the researcher's professional experience). Data for questions 2 and 3 were collected primarily during field research, from professional literature, and from the researcher's professional experience.

The study focused on collection, analysis, and interpretation of data pertaining to Sulha across all stages of the Israeli criminal process, from the stage of investigation to that of indictment, determination of guilt by the court, to appeal, and finally to the stage of conditional release by a parole commission. The scope of the study is limited to the legal status of Sulha in Israeli criminal law with regard to statutory laws regulating criminal justice; verdicts and other decisions rendered by the various courts (supreme, district, and magistrate) during the years 1990–2014; and parole commission decisions published on the website of the Judicial Authority ([www.court.gov.il](http://www.court.gov.il)).

## **1.2. Research Objectives**

### **1.2.a. Overall Objectives**

Three general aims were set for the study:

1. To explore and assess the legal standing/status of Sulha in Israeli criminal law;
2. To assess the possibility of incorporating Sulha in Israeli criminal law, as well as the conditions for such a development;
3. To propose a new theory and model of the Israeli criminal process and draft a legislative proposal/draft to incorporate Sulha within Israeli criminal law.

### **1.2.b. Specific Objectives**

The specific aims of the study were as follows:

1. To improve and strengthen the central elements of the Israeli criminal justice system, e.g. the principle of equality before the law and uniformity of punishment, the principle of constitutionality in criminal law, the right to due process, keeping miscarriages of justice to a minimum, buttressing public

confidence in judges and in the judicial authority, strengthening justice, and so forth;

2. To identify the factors contributing to the decline in public confidence in the Israeli criminal justice system, and to examine potential means of buttressing public confidence in it;
3. To reduce judicial burden and decrease the number of pending cases, thus improving judges' work and the functioning of the judicial system;
4. To effect a change in the Israeli criminal justice system specifically, and in general to strengthen Israeli democracy and the doctrine of restorative justice in criminal law, thus furthering the causes of justice, truth, and peace;
5. To initiate a dialogue with professionals in the field of criminal justice in Israel and elsewhere;
6. Finally, the personal aim of the present study was to enrich the researcher's professional knowledge; reduce his professional workload; and improve the state of his workplace viz. the courthouse.

It is the researcher's belief that, following adoption of the answers to the research questions and their translation into practice in Israeli criminal justice, the results of the study will enhance the Israeli criminal justice system while bolstering its influence, efficiency, and ability to function in society. The results of the study will improve the work done by judges and the courts in fulfilling their primary responsibilities, viz. discovering the truth and doing justice in society. The results of the study also will strengthen Israeli democracy and give expression to its central elements, among them the rule of law and preservation of key values and human rights. Incorporation of Sulha in the Israeli criminal justice system will bring about consensual, accordant restoration of the injuries brought about by the criminal act, thus empowering both the individual and society as well as contributing to integration in Israeli society of its Arab minority. It also will significantly reduce the rate of recidivism among offenders. The study suggested means of coping with and solving conflicts that are more efficient for the parties affected by the criminal act: the victim, the offender, and the community. It bolsters the rights and standing of the victim in criminal justice.

### 1.3. The researcher's practice and justifications for the WBP

The researcher serves as a judge in District Court of yhr Central District I. He received his appointment as a judge in magistrate court in 1997. In 2001 he was appointed vice president of the magistrate courts of the Northern District, and in 2009 he was appointed a senior Judge. In 2016 he was appointed as a judge in District Court. He also serves in various other public capacities, including as chairman of a parole commission, chairman of the Safed District Knesset Elections Committee, and chairman of the committee charged with examining and licensing attorneys in Israel. Prior to appointment as a judge, he ran a legal practice and was a member of a *Sulha J'aha/* committee.

In the State of Israel, as of December 31, 2014, there are 686 practicing judges, as follows: 17 Supreme Court judges, 182 district court judges, 424 magistrate court judges, and one judge at the Courts Administration. In addition to the above there are 65 registrars: one Supreme Court registrar, 50 district court registrars, 13 labor court registrars, and one registrar at the Courts Administration (RAJI, 2014, pp. 10–12).

The activity of Israeli courts in 2014 may be summarized as follows:

Cases Court	Opened		Closed		Stock / Inventory	
	Number of cases	%	Number of cases	%	Number of cases	%
Supreme	3,642	0.5%	3,852	0.5%	3,574	0.8%
District	63,327	8.5%	58,669	7.7%	48,580	11.0%
Magistrate	622,249	83.6%	647,420	84.7%	344,677	77.7%
Labor	55,412	7.4%	54,148	7.1%	46,608	10.5%
Total	744,630	100%	764,089	100%	443,439	100%

(RAJI, 2014, p. 9).

**Table 1: The activity of Israeli courts in 2014.**

With regard to criminal cases, the activity of Israeli courts in 2014 was as represented below:

Cases Court	Opened		Closed		Stock / Inventory		Time to resolution
	Number of cases	%	Number of cases	%	Number of cases	%	Number of cases
Supreme	801	0.3%	820	0.2%	681	0.7%	10.7
District	17,815	5.0%	17,562	4.9%	4,669	4.7%	11.6
Magistrate	333,494	94.6%	341,081	94.7%	92,435	94%	12.0
Labor	365	0.1%	725	0.2%	646	0.6%	32.8
Total	352,475	100%	360,188	100%	98,431	100%	--

(RAJI, 2014, pp.14, 19, 27, 35).

**Table 2: The activity of Israeli courts in 2014 with regard to criminal cases.**

The State of Israel ranks quite low in its judge-to-population ratio. A comparative report by the European Commission for the Efficiency of Justice found that in Israel there are 8.2 judges per 100,000 residents, as opposed to an average of 20.92 judges per 100,000 in the countries of the European Commission (CEPEJ, 2014). Israel also ranks third among 17 European states in terms of judicial burden (Kenan et al., 2007).

Further, exonerations in criminal cases in Israel as of 2008 were *extremely* rare, at a rate of 0.1% (CBS, 2008). In 2010, the rate of exoneration was 1% (CBS, 2010)! Various studies have demonstrated the existence of discrimination in the Israeli criminal justice system between the Jewish majority and the Arab minority, with the Arab minority suffering adverse discrimination (Rattner, 1999; Rattner et al., 1998; Fishman et al., 1987; Gazal et al., 2009; Kraminzer et al., 1993; Haj-Yihya et al., 1994; Regev, 2004; Serhan and Elias, 2013).

The decline of public confidence in the Israeli criminal justice system, judicial burden, and the sense of inappropriate discrimination against the Israeli Arab minority have

been of great concern to the researcher from the day he was appointed a judge of the State of Israel to the present. He has constantly asked himself, “What can I do to rectify the faults of the Israeli criminal justice system?” “How can I help bolster the standing of judges and the judicial authority in Israel and contribute to the effective discharge of their responsibility to discover the truth and do justice in society?” “What might be done to bolster the confidence of the Israeli public in judges and in the judicial authority?” “What might be done to improve the criminal process and reinforce the human rights of all human beings in the State of Israel?” “How might Sulha be incorporated in the Israeli criminal justice system?” These questions were posed to the interviewees and the Delphi panelists consulted in the present study.

The researcher believes that (formal) Israeli criminal law no longer is the consummate mechanism for resolution of conflicts between offender and victim created by the criminal act. Sulha has a contribution to make as an integral part of the criminal process; the Sulha process permits consensual, accordant restoration of injuries resulting from the criminal act. It is not presumed that Sulha might offer a preferable parallel option to the formal Israeli criminal justice system. The present study is the first qualitative study in the field to examine the status of Sulha in Israeli criminal law and proposes a new model for Israeli criminal justice. It is concerned with exploratory research that collects, analyzes, and interprets knowledge and offers high-quality findings concerning Sulha in the Israeli criminal justice system. The study also provides justifications for incorporation of Sulha in Israeli criminal law, based on the reliable qualitative data obtained by the qualitative method and qualitative analysis of these data. The present work is the first qualitative study in the field. Even though recent decades have seen an increase in the use of qualitative studies in research concerning organizations (Boodhoo and Purmehure, 2009).

#### **1.4 About the Study**

The researcher’s WBP is a qualitative-interpretive single case study focused on developing an understanding of the legal status of Sulha in Israeli criminal law. The researcher’s hope was to gain a more naturalistic understanding of the case and the issue on which it centers. The study provided the researcher with an opportunity to gain a deep, holistic view of the case as well as facilitated description, understanding, and explanation of the case (Baxter and Jack, 2008). The researcher’s aim was to plan a high-quality case study and then to collect, present, and analyze data in a fair manner.

The researcher embarked on his rigorous methodological path principally by thoroughly reviewing the literature and by carefully and thoughtfully posing research questions and objectives. Formal and explicit procedures were carefully maintained throughout the research process, and the researcher studied and was well aware of the strengths and limitations of the case study approach.

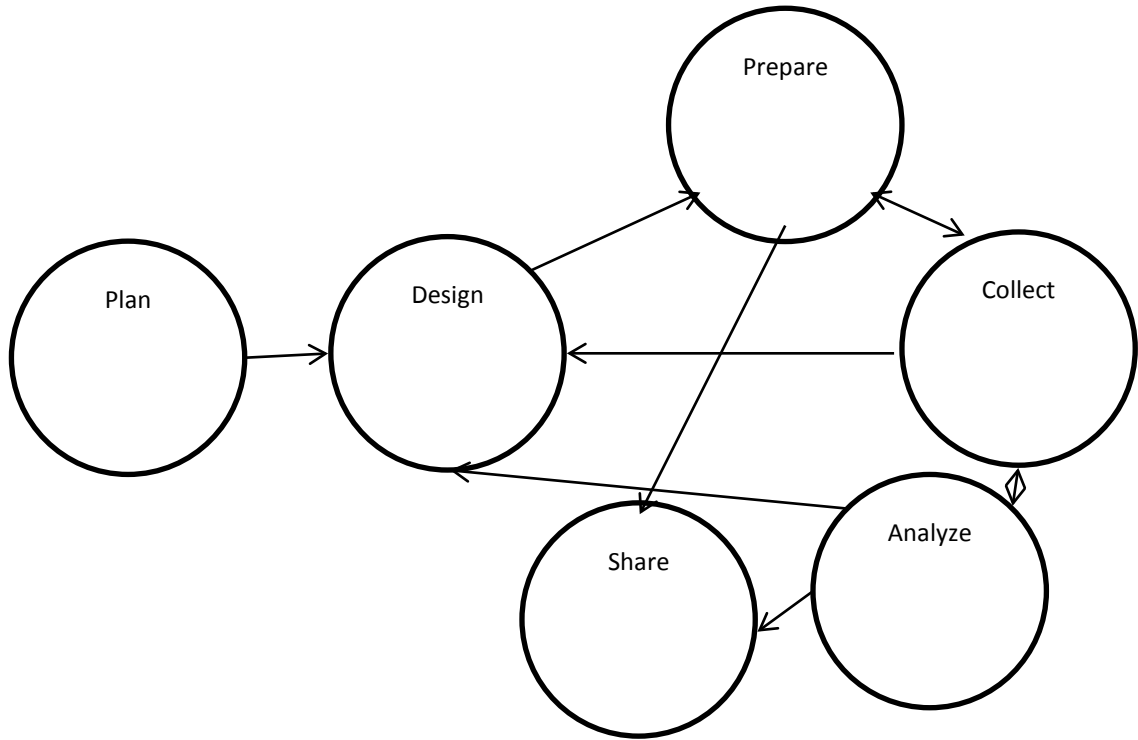
The researched case is a complex and unique legal issue, and this qualitative single case study is the first effort at academic and professional research into the matter. The case study approach allows in-depth, multi-faceted exploration of an issue in its real-life setting, and enabled the researcher to preserve holistic and meaningful characteristics of the issue examined in the case study (Yin, 2009; Crown et al., 2011).

The case study approach is employed extensively in a wide variety of disciplines, particularly in the social sciences (Yin, 2009; Crown et al, 2011). Its value is widely recognized in the field of law (Crown et al., 2011).

George and Bennett argued “that the investigator chooses to study with the aim of developing theory ... regarding the causes of similarities or differences among instances (cases) of that class of events” (George and Bennett, 2005, p. 17). The case study approach lends itself well to capturing information with the help of the researcher’s explanatory *who*, *what*, and *why* qualitative unstructured questions and can help develop or refine theory (Crown et al., 2011).

In accordance with the research paradigm, the present case study employed the interpretive epistemological approach. The interpretive approach, which emphasises the need to understand meanings or contexts and processes as perceived from different perspectives is trying to understand individual and shared social meanings, and focuses on theory building (Crown et al., 2011).

Based on Yin's case study process, research was conducted in six crucial, linear, and interdependent stages: *plan*, *design*, *prepare*, *collect*, *analyze*, and *share*.



**Figure A: The Case Study Process (adapted from Yin, 2009, p.1).**

In the planning stage, I focused on identifying research questions and the rationale for execution of the case study. I chose to employ the single case study method after comparing it with other methods and gaining an understanding and thorough knowledge of both its strengths and its limitations (Yin, 2009; Baskarada, 2013). Research began with a thorough and comprehensive review of the literature and careful consideration of the research questions and study objectives (Yin, 2009; Baskarada, 2013), with the goal of ensuring that there would be no mismatch between the research questions and the case study approach. The case study approach was determined by the type of research questions, the researcher's control over the case, and the focus on a contemporary case/issue. This method permits explanatory (inductive) findings, may be based on a single case, and may include qualitative data (Baskarada, 2014). Further, it may be exploratory, descriptive, or explanatory, and is the preferred research method when



*how, what, and why* questions are posed and the researcher has little control over events (Yin, 2009). The aim is to generalize to theory, rather than to the population through statistical analysis and generalization (Yin, 2009; Baskarada, 2014).

During the design stage, the researcher focused on defining the unit of analysis, , developed propositions and identifying issues underlying the study, identified the case study design (single) and developed procedures to maintain research quality (Yin, 2009; Baskarada, 2014).

The carefully formulated research questions, informed by the existing literature and prior appreciation of the theoretical issues at hand and the setting of the research, all were important in appropriately and succinctly defining the case (Crown et al., 2011).

The research design effectively links the research questions to the research conclusions through the steps undertaken during the data collection and data analysis processes (Yin, 2009).

The single case study model was selected based on *convenience* and *purpose*. This model is expedient for purposes of data collection, as well as facilitates collection of the most relevant data (Edmonds and Kennedy, 2012). Significantly, research quality depends on construct validity, internal validity, external validity, and reliability (Edmonds and Kennedy, 2012; Baskarada, 2014).

Strategies for improving construct validity (operationalization) were adopted: the use of multiple sources of evidence (documents, archival records, interviews, Delphi survey, personal experience and personal diary), having key informants review the case study report and the maintenance of the chain of evidence (Yin, 2009). Methodological and source triangulation, the researcher's triangulation, and theory triangulation can serve to ensure internal validity (Baskarada, 2014; Mason, 2002; Stake, 1995; Lincoln and Guba, 2000). It is the researcher's belief that the findings of the study are generalizable to other cases (external validity), and that the same results may be obtained by repeating the data collection process (reliability) (Yin, 2009).

A case study protocol and case study database were carefully created and developed (Yin, 2009).

The research identified a quality range of relevant data dimensions, e.g. accuracy, objectivity, relevancy, concise and consistent representation, value added,

completeness, amount of information, accessibility, access security, etc (Baskarada, 2014).

During the preparatory stage, I developed skills as a case study investigator and developed a case study protocol, beginning with a thorough review of the literature concerning theory and methodology (Yin, 2009).

I believed myself sufficiently familiar with the study domain, and had a good understanding of the main concepts and theoretical issues relevant to the study. I was able to interpret the information in real time and adjust data collection activities so as to suit the case study (Yin, 2009).

In order to develop both an indepth and a multi-dimentional understanding of the case, the study approach included collection of multiple sources of evidence (data triangulation) and a range of qualitative techniques, e.g. documents, archival records, interviews, Delphi survey, personal experience, and personal diary (Crown et al., 2011; Yin, 2009).

The chain of evidence was maintained. Relevant evidence (e.g. interview transcripts, researcher notes, documentary evidence, preliminary analysis) was stored in the database (Baskarada, 2014), permitting me to develop an audit trail beginning with data collection, continuing with analysis, and finally on to conclusions. All items in the database were categorized, indexed, and cross-referenced to facilitate easy retrieval (Baskarada, 2014).

The interviews conducted were unstructured.

In the context of this study, “data analysis consists of examining, categorizing, tabulating, testing, or otherwise recombining evidence to draw empirically based conclusions” (Yin, 2009, p. 106).

The constant comparative method (CCM) and theoretical sampling constitute the core of qualitative analysis (Boeije, 2002; Baskarada, 2014). Analysis strategy followed the theoretical propositions that led to the case study (Yin, 2009), and coding descriptive, topic, and analytical data was the key step in the analysis process.

The findings of the study have implications for both theory development and theory testing (Crown et al., 2011). They established weaken historical explanation of the case,

and allow theoretical generalization beyond the specific case at hand (George and Bennett, 2005).

The audiences identified during the share stage were the professionals in the field, e.g. judges, legislators, administration officials, judge advocates, attorneys, prosecutors, Sulha council members, parole commission members, and probation officers. A draft of certain sections of the report was reviewed by the participants, and a draft of the entire report was reviewed by peers with relevant expertise in the subject matter. The study was presented at the fourteenth annual Israel Bar Association Conference, on May 27th, 2014, where it received an excellent response from the audience.

Last but not least, ethical issues relating to the present research were duly considered. The researcher kept in mind the principle that no harm must be done to participants.

## **Chapter One: Professional Literature Review**

### **1.1. Introduction**

The subject of this thesis was the legal status of *Sulha* in the criminal law of the state of Israel. *Sulha* is a conciliation and dispute resolution mechanism that is widely accepted among Arab peoples. The literature review surveyed research in the following fields: the establishment of the State of Israel, the population of Israel, the Arab minority in Israel, the structure of the Israeli judiciary, the Israeli criminal justice system, Alternative Dispute Resolution (ADR) in criminal law and *Sulha*, particularly Israeli professional legal literature relating to *Sulha*. First I discussed the Declaration of the Establishment of the State of Israel and the population of Israel, including the Arab minority, after which I surveyed the structure of the Israeli judiciary and the Israeli criminal justice system in general. The chapter concluded with a review of the scholarly literature on Israeli criminal law and the institution of *Sulha*.

### **1.2. Declaration of Establishment of the State of Israel (DESI)**

On May 14, 1948, the Jewish People's Council (Hebrew: *Mo'eẓet ha-'Am*) declared the establishment of the State of Israel.

DESI serves the following notable functions:

1. Asserts the natural rights of the Jewish people to exercise self-determination in their sovereign state;
2. Proclaims the establishment of a Jewish state in *Ereẓ Yisra'el* (the Land of Israel);
3. Establishes provisional institutions of state governance, including the Provisional State Council and the provisional government;
4. States that an elected constituent assembly will formulate a constitution within several months;
5. Sets forth the fundamental principles of political rule to govern the newly formed state; and

6. Calls for peace and cooperation with the Arab minority in the State of Israel, the neighboring Arab countries and their people, Jews throughout the Diaspora, and the United Nations.

Generally speaking, DESI consists of five main sections. The first, an introduction, is a historical preface that reviews the ties of the Jewish people to the Land of Israel. This section describes the political, cultural, and religious emergence of the Jewish people in the Land of Israel and their political independence there, the hope of the Jewish people throughout the Diaspora to return to their homeland, international recognition of the Jewish people's right to their own sovereign state, and the natural right of the Jewish people to be like any other group, expressing self-determination in a sovereign state.

The second and operative section of DESI, the proclamation of the establishment of the State of Israel, specifies the time of the beginning of independence and discusses the practical functions of state institutions. This section also states, *inter alia*, that a constitution is to be enacted by an elected constitutional council, and that governmental institutions are to be elected in accordance with the constitution.

The third section gives expression to the basic and fundamental principles and guidelines to govern Israeli society and the Israeli state—"the credo of the people." Israel, it states, is to be a) a state for Jewish immigration (Hebrew: *'aliyyah*) and "the ingathering of the exiles", b) a state for the benefit of all its inhabitants, and c) a state based on the fundamental principles of freedom, justice, and peace—a state in which all inhabitants enjoy equal social and political rights, as well as freedom of religion, conscience, language, education, and culture.

The purpose of this section of DESI is to emphasize the importance of and guarantee Jewish immigration to the new state and the rights of religious and national minorities, most notably Arabs. Notwithstanding, the struggle to implement the rights of the non-Jewish minorities of Israel continues to this day.

The fourth section of DESI includes appeals and declarations addressed to "the Arab inhabitants of the State of Israel," "all neighboring countries and their people," "the United Nations," and "the Jewish people in the Diaspora."

DESI calls on the Arabs of Israel to be peaceable and to participate in the building of the state, implying full and equal citizenship. An appeal for peace and good neighborly relations is addressed to all neighboring Arab countries and their people, as well.

DESI also urges the United Nations to admit the State of Israel into its ranks.

Finally, the declaration urges the Jews in the Diaspora to rally around the State of Israel by undertaking the tasks of immigration, building up the State, and fighting for it.

The fifth and final section of DESI contains the signatures of the members of the People's Council (Rubinstein and Madena, 2005).

### **1.3. The Constitutional Status of DESI**

There is no doubt that the question of the role of DESI in Israeli law is a significant one with practical legal implications.

It is a matter of consensus that DESI is not a constitution. In one of the first judgments delivered in the early years of the State of Israel, the Supreme Court ruled that DESI represents the vision of the people and their ideology, but "it constitutes no constitutional law that in practice legislates the matter of observance of different ordinances and laws, or their annulment" (HCJ 10/48 *Zev v. Governek*, *Israel Law Review* 1 [1949] 85, 89; HCJ 73/53 *Kol Ha-'Am Ltd. v. Minister of Interior*, *Israel Law Review* 3 [1953] 871, 884; HCJ 72/62 *Rofeaizen v. Minister of Interior*, *Israel Law Review* 4 [1962] 2428, 2447; EA 1/65 *Yaredor v. Head of the Central Election Committee of the Sixth Knesset*, *Israel Law Review* 3 [1965] 365, 385–386).

The Supreme Court also ruled, however, that DESI is a source on which courts of law may draw for purposes of interpretation (EA 2/88 *Ben Shalom v. Central Election Committee of the Twelfth Knesset*, *Israel Law Review* 4 [1988] 221, 231; HCJ 153/87 *Shakdiel v. Minister of Religious Affairs*, *Israel Law Review* 2 [1988] 221, 274; HCJ 620/85 *Me'aari v. Speaker of the Knesset*, *Israel Law Review* 4 [1985] 169, 225–226).

What is the legal status of DESI subsequent to the passage of Basic Laws such as the Human Dignity 1996 (BLHDL) and Freedom of Occupation 1996 (BLFO)?

This question arises in light of the fact that these Basic Laws established in their initial clause, the "section on fundamental principles," that:

The fundamental rights of people in Israel are based on acknowledging their human value, the sanctity of their life, and their being free men, and these principles will be respected in the spirit of the Declaration of the Establishment of the State of Israel. (BLHDL, section 1; BLFO, section 1)

Indeed, after the legislation of these two Basic Laws, three different approaches to the above question were expressed in the legal literature as well as in the legal practice of the Supreme Court.

According to the first approach, the section on fundamental principles (the first clause of BLHDL and BLFO) does not change the legal status of DESI from what it was prior to legislation of these Basic Laws. DESI is not a statute; it does not in its own right constitute a legal source for human rights, and does not serve as an independent basis for judicial review of legislation. DESI is merely an interpretive source for Israeli legislation (Eilon, 1996; Justice Or in H CJ 1554/95 *Gilat Association v. Minister of Education, Culture, and Sports*, *Israel Law Review* 3 [1996] 2, 26–27; Justice Cheshin in H CJ 4112/99 *Adala v. Municipality of Tel Aviv–Jaffa*, *Israel Law Review* 5 [2002] 393).

The second approach assumes that the section on fundamental principles in the above Basic Laws is an independent legal source for human rights: DESI constitutes an independent source for human rights in Israeli law, and the section on fundamental principles grants DESI a supreme legal status with regard to all of the fundamental rights invoked within it (Justice D. Levin in H CJ 726/94 *Klal Insurance Ltd. v. Minister of Finance*, *Israel Law Review* 5 [1994] 441, 464–465; CA 6821/93 *United Mizrahi Bank v. Megdal*, *Israel Law Review* 4 [1995] 221, 309; Shohtman, 2000; Aktzin, 1962; Bendor, 2000; Barak, 2004; Justice D. Levin in H CJ 1661/05 *Regional Council of Gaza Beach v. Knesset*, *Israel Law Review* 2 [2005] 482, 769).

The third approach is an intermediate one that lies between the interpretive and the independent model. It assumes that there was a significant change in the legal status of DESI subsequent to the passage of BLHDL and BLFO. Following the legislation of these laws and by virtue of their section on fundamental principles, the fundamental rights of people in Israel should be respected in the spirit of DESI principles, and this is

a legal requirement that cannot be contravened by lesser laws. However, DESI did not become an independent source for human rights, and does not in its own right serve as a basis for judicial review of legislation. It remains an expression of “the nation’s scroll of values” and credo, but these values have risen from being a part of general law to constitutional statutes: the values described in DESI have become constitutional values, rather than legal values (HCJ 4541/94 *Miller v. Minister of Defense*, *Israel Law Review* 4 [1995] 94, 131; CA 6821/93 *United Mizrahi Bank Ltd.* ad loc., p. 309; CA 294/91 *Kadesha v. Kastenbawm*, *Israel Law Review* 2 [1993] 646, 512; CA 2266/93 *X v. Y*, *Israel Law Review* 1 [1992] 221, 233; HCJ 2671/98 *Women’s Lobby in Israel v. Minister of Welfare and Labor*, *Israel Law Review* 3 [1998] 630; Rubinstein and Madena, 2005; Rubinstein, 2003).



#### 1.4. The Population of Israel

As of the start of 2015, the State of Israel was home to 8.345 million inhabitants, including 6.251 million Jews (74.39%); 1.730 million Arabs (20.7%); and 364,000 others (4.4%; CBS, 2014

**Table 2: The forecast for the Israeli population until 2030 (CBS, 2008)**

	Others	Arabs (2)				Jews	Total population
		Druze	Arab Christians	Muslims	Total		
	Thousands						
2005							
Base population	299.8	115.2	118	1,140.6	1,374.6	5,313.8	6,988.2
2015							
High variant	374.9	139.4	132.8	1,492.4	1,764.6	6,158.4	8,297.8
Medium variant	362.1	138.2	132.8	1,467.0	1,738.0	6,074.4	8,174.5
Low variant	354.6	137.8	132.8	1,458.5	1,729.1	6,025.3	8,109.0
2030							
High variant	465.7	179.5	153.6	2,240.9	2,574.0	7,566.1	10,607.8
Medium variant	417.6	175.0	153.6	2,033.0	2,361.6	7,205.4	9,984.6
Low variant	402.9	169.9	153.6	1,955.5	2,279.0	6,907.2	9,589.1
	Average yearly percent growth (3)						
2005–2015							
High variant	2.3	1.9	1.1	2.7	2.5	1.5	1.7
Medium variant	1.9	1.8	1.1	2.5	2.4	1.3	1.6
Low variant	1.7	1.8	1.1	2.5	2.3	1.3	1.5
2015–2030							
High variant	1.5	1.7	1.0	2.7	2.5	1.4	1.7
Medium variant	1.0	1.6	1.0	2.2	2.1	1.1	1.3
Low variant	0.9	1.4	1.0	2.0	1.9	0.9	1.1

(1) These population estimates do not include the foreign worker population (including workers residing in Israel for less than one year), who numbered approximately 178,000 at the end of 2005.

(2) Total population and Arab population do not include Lebanese (2,500 at the end of 2005).

(3) Geometric mean.

### 1.5. The Arab minority

It must be noted that at the time of the establishment of the state (in 1948), the Arab population constituted approximately 18% of the entire population. Since 2001 there has been a visible upward trend in the percentage of Arabs in the Israeli population, and as of the end of 2014, they constituted approximately 20.7% of the population (CBS, 2014).

The State Investigative Commission on the October 2000 Events (SICOE) stated that the Arabs in Israel constituted a large minority, distinguishable from the Jewish majority by nationalism, ethnicity, language, and culture. The majority–minority relationship in Israel is a problematic and highly complex one. Several unique characteristics add to the complicated and problematic socio-political status of the Arabs of Israel. First, this population is a native-born population that sees itself as subjected to the hegemony of the Jewish majority, which is mainly comprised of immigrants: this is not a situation of an immigrant minority. The tension between the native minority and the immigrant majority is strong.

Second, the Arab minority in Israel is an antecedent of the majority population in Israel before the establishment of the state in 1948.

Third, the dramatic change in the status of the Arab population from majority to minority is a result of the profound defeat that the Arab nations suffered at the hands of the Jewish population during the 1948 Israeli War of Independence.

Fourth, the establishment of the State of Israel as a Jewish state in the Land of Israel that is open to Jewish *'aliyyah* and to the ingathering of Diaspora communities and practical application of Zionist values—especially gaining control over the majority of the land and judaization of the state—have given rise to increased protests by the Arab minority.

Fifth, the Arab minority in Israel, especially Muslims and Christians, belongs specifically to the Palestinian nation and more generally to the Arab nation, which have been in ongoing conflict with Israel for quite some time.

Sixth, in general, the Arab minority in Israel has no substantial collective rights. The entire population of Israel, including the Arab minority, enjoys personal rights, but the Arab minority is not recognized as a national minority deserving of collective rights (SICOE, 2003, pp. 26–29).

There are four main exceptions to this rule. First, the Arabic language is an official language of Israel and is the language of the Arab minority (King's Order in Council 1922 [Revised], section 82; Law of Interpretation 1981, section 24; CA 105/92 *Ram Contractors and Engineers Ltd. v. Municipality of Upper Nazareth*, *Israel Law Review* 5 [1999] 189, 210; HCJ 4112/99 *Adala v. Municipality of Tel Aviv*, *Israel Law Review* 5 [2002] 393, 409–415; Rubinstein and Madena, 2005; Salton, 1967).

Second is judicial authority concerning personal status. The Arab population has religious courts that are authorized to deliberate on issues of personal status as defined in section 51 of the King's Order in Council 1922, in part or in whole. These religious courts are granted sole authority regarding certain issues and parallel authority with regard to others.

Islamic religious courts (sharia courts) in Israel are authorized to deliberate on issues concerning the personal status of Muslims and establishment and inter-management of *wakf* trusts, excluding sacred property of absentee landlords, and may rule according to their own religious laws, i.e. Islamic law (King's Order in Council 1922, section 52; Absentee Landlords Ordinance 1950, sections 2, 4, 19; HCJ 52/06 *Alaqa for Moslem Holy Places in Israel Ltd. v. Wiesental* [unreported], decision of Oct. 29, 2008; CA 10835/04 *Samoni v. Slela* [unreported], decision of Mar. 5, 2006; HCJ 8906/04 *X v. Y* [unreported], decision of Jul. 20, 2005; HCJ 6483/05 *Kaa'dan v. Minister of Interior* [unreported], decision of Aug. 9, 2010).

For the Druze population of Israel, marriage and divorce are under the sole authority of the Druze court of law, which likewise has sole authority in matters relating to the establishment and inter-management of sacred property. Regarding issues such as the personal status of Druze, as detailed in section 51 of the King's Order in Council 1922, or the Ordinance of Inheritance, over which the court does not have sole judicial authority, the court issues a judgment after all parties to the matter have given their consent (Religious Druze Courts Law 1962, sections 4, 5; HCJ 9611/00 *Mar'ai v. Mar'ai*, *Israel Law Review* 4 [2004] 256, 264–265; HCJ 642/82 *Safadi v. Druze Court of Appeal*, *Israel Law Review* 3 [1983] 381, 383–384).

The judiciary authorities of the various Christian ethnic groups in Israel (Eastern Orthodox, Latin-Catholic, Gregorian-Armenian, Catholic-Armenian, Syrian-Catholic, Habashdit-Haoniatri, Greek-Catholic, Maronite, Syrian-Orthodox, Evangelist-

Episcopal) is given statutory standing by section 54 of the King's Order in Council 1922, which establishes that the religious courts are to have sole judicial authority with regard to "marriage, divorce, and alimony of people within their own group who are not foreign subjects." With regard to all other aspects of personal status, as defined by section 51 of the King's Order in Council 1922, the Christian judiciary has parallel authority. Rulings issued by the courts of the various Christian ethnic groups are binding "when all parties concerned accept their ruling" (King's Order in Council 1922, section 54(b); HCJ 3238/06 *Sleman v. Archbishop Siah* [unreported], decision of Feb. 23, 2009).

It bears emphasis that an imperative condition for the sole or parallel authority of each court on matters of personal status is that all parties belong to the religious ethnicity of the court (Basic Law: Human Dignity 1996, section 64(a), 65; Shawa, 2001; HCJ 9476/96 *Sargobi v. Jerusalem Rabbinic Court* [unreported], decision of Sep 11, 2006).

The third exception is the separate educational system of the Arab community in Israel, which provides both formal and informal education. Formal education includes pre-elementary (ages 0–6), elementary (ages 6–12), post-primary (junior high schools and high schools), and comprehensive schools (age 12–17), acknowledged unofficial schools, tertiary education, and higher education.

Informal educational frameworks entail activities pursued within the community, particularly among youth, whose purpose is education and often adult education. The Arab community has approximately 605 schools, with approximately 325,000 students at each grade level. There are approximately 18,000 teachers in the system, which is administered by its own superintendent (H'ateb, 2008).

Abu-Asbi argued that the Arab educational system operated under conditions of inequality in terms of financial investment, and correspondingly suffered from inferior performance. The system suffers greatly from insufficient financial resources, as well as from marked formal inequality in its budget, teaching hours per class and student, quality of professional teaching, and quality of supporting services (Abu-Asbi, 2008).

Section 2 of the National Education Law 1953 specifies that among the goals of education in Israel is that students know "the language, the culture, the history, and the unique legacy and tradition of the Arab population." Yet as noted by Elhag, the educational curriculum in Arab schools emphasizes the uniqueness of the Arab

population in Israel, rather than underscoring its similarities to the Palestinian populace and the Arab nation, of which it is a part, and there is no systematic teaching of Palestinian history or of Palestinian authors and poets who have recorded it (Elhag, 1995).

The fourth exception is that members of the Arab population are allocated a weekly day of rest according to religious orientation.

### **1.6. Israeli Arabs' Feelings of Discrimination and Deprivation**

Feelings of discrimination and deprivation are widespread amongst the Arab population of Israel (Smootha, 2013; SICOE, 2003).

The Israeli authorities have acknowledged the existence of discrimination and deprivation of the Arab sector and are unified in the view that feelings of discrimination and deprivation amongst the Arab population are a significant factor in the radicalization of the Israeli Arab public (SICOE, 2003). The Israeli Supreme Court has asserted in quite a few rulings that in certain areas (e.g. education, land, budget, social services, employment, poverty, offensive social attitudes, nationality, family life) the state treats the Arab population unequally (HCJR 6277/92 *National Council for the Child v. Minister of Labor and Welfare*, *Israel Law Review* 1 [1993] 148; HCJ 2814/97 *High Committee for Arab Education in Israel v. Minister of Education*, *Israel Law Review* 3 [1999] 233; HCJ 1113/99 *Adala v. Minister of Religions*, *Israel Law Review* 2 [2000] 164; HCJ 240/98 *Adala v. Minister of Religions*, *Israel Law Review* 5 [1998] 167; HCJ 727/00 *Committee of Arab Municipal Councils in Israel v. Minister of Building and Construction*, *Israel Law Review* 2 [2000] 79; HCJ 6698/95 *Ka'adan v. Israel Land Administration*, *Israel Law Review* 1 [2000] 258; HCJ 840/97 *Sbeth v. Government of Israel* [unreported], decision of Jun. 26, 2003; HCJ 6924/98 *Association of Civil Rights in Israel v. Government of Israel*, *Israel Law Review* 5 [2001] 15; LCA 6709/98 *General Attorney v. Moledet-Gesher-Zomet List*, *Israel Law Review* 1 [1999] 351; HCJ 7052/03 *Adala v. Minister of Interior* [unreported], decision of May 14, 2006; HCJ 8276/05 *Adala v. Minister of Defense* [unreported], decision of Dec. 12, 2006).

### **1.7. The Structure of the Israeli Judiciary**

Section 1 of Basic Law: Judiciary 1984 (BLJ) establishes that judicial authority in Israel is to be exercised by the Supreme Court, district courts, magistrate courts, religious courts, and other courts, as specified by the law.

The Supreme Court is located in Jerusalem, and as of the conclusion of 2014 counted fifteen judges and two registrars (Judiciary Annual Report [JAR], 2014). It is authorized to hear appeals of other courts' judgments and various decisions handed down by district courts (BLJ, section 15(b)).

The Supreme Court also serves as a high court of justice, authorized to deliberate on issues it deems to require judicial intervention on which other courts of justice are not authorized to deliberate (BLJ, section 15(c)). In addition, it has the power to release people who have been wrongfully arrested or incarcerated, to issue court orders to state bodies, local governments, and their agents, and other public servants in legally recognized capacities, requiring them to take specific actions or to prevent specific actions from being taken in the course of fulfilling their duty to the public as specified by the law, to prevent them from acting if they have been elected or appointed illegally, to issue instructions to courts of law and justice and to people with judicial authority or semi-judicial authority to pass judgment regarding a given person, or prevent them from ruling on issues regarding a person; to annul deliberations and rulings that were reached in a manner contrary to the law. In addition the Supreme Court can issue instructions to religious courts to deliberate on issues regarding a specific person in keeping with their authority under the law, or to prevent them from deliberating on issues not under their legal authority (BLJ, section 15 (d)); and to perform a variety of other functions as established in various statutes (BLJ, section 15 (e)). Also under the purview of the Supreme Court are rulings on matters concerning district courts, magistrate courts, and other courts, among these their establishment, powers, locations, and jurisdictions (BLJ, section 16).

The Courts Law [Consolidated Version] 1984 regulates, inter alia, the establishment of district courts and magistrate courts and their powers. There are six district courts in Israel: Jerusalem, Tel Aviv, Central Israel, Be'er Sheva', Nazareth, and Haifa. One hundred eighty-two judges serve in the various district courts (JAR, 2014). These courts are authorized to deliberate on any civic or criminal issue that is not under the

jurisdiction of a magistrate court, as well as on administrative appeals and lawsuits (Administrative Issues Law 2000), and hold any power that is not specifically assigned to another court. They also hear appeals of rulings and other decisions issued by magistrate courts (CL, section 40).

There are thirty magistrate courts in Israel, in which 424 judges were serving as of the end of 2014 (JAR, 2014). A magistrate court is authorized in general to sit in judgment of felonies whose punishments are strictly financial in nature or include imprisonment for a period not exceeding seven years; civil affairs, with the exception of real estate cases in which the amount in question or value of the property does not exceed 2,500,000 NIS (new Israeli shekels), matters concerning ownership and use of real estate properties, and family affairs (CL, section 15).

A magistrate court also serves as a court of justice for several types of cases:

1. Minor lawsuits: The court is authorized to hear a civil lawsuit filed by an individual involving amounts specified by the law, as well as to order that a product that has been sold be replaced or fixed, or that the transaction be canceled (CL, section 60).
2. Local affairs: The court is authorized to judge felonies in accordance with the provisions of the Municipalities Ordinance [Revised Version] 1964, the Local Council Ordinance [Revised Version] 1965, and the Planning and Construction Law 1965 (CL, section 55).
3. Traffic: The court sits in judgment of traffic violations and felonies (Motorized Vehicle Insurance Ordinance [New Version] 1970, sections 30–50; Traffic Ordinance [New Version] 1961, sections 25–26).
4. Rent: The court is authorized to judge cases concerning rental fees of apartments and places of business, matters involving decrease in rent, and issues concerning services and maintenance of a leasehold (Landlord and Tenant Law [Consolidated Version] 1972, sections 138–140).

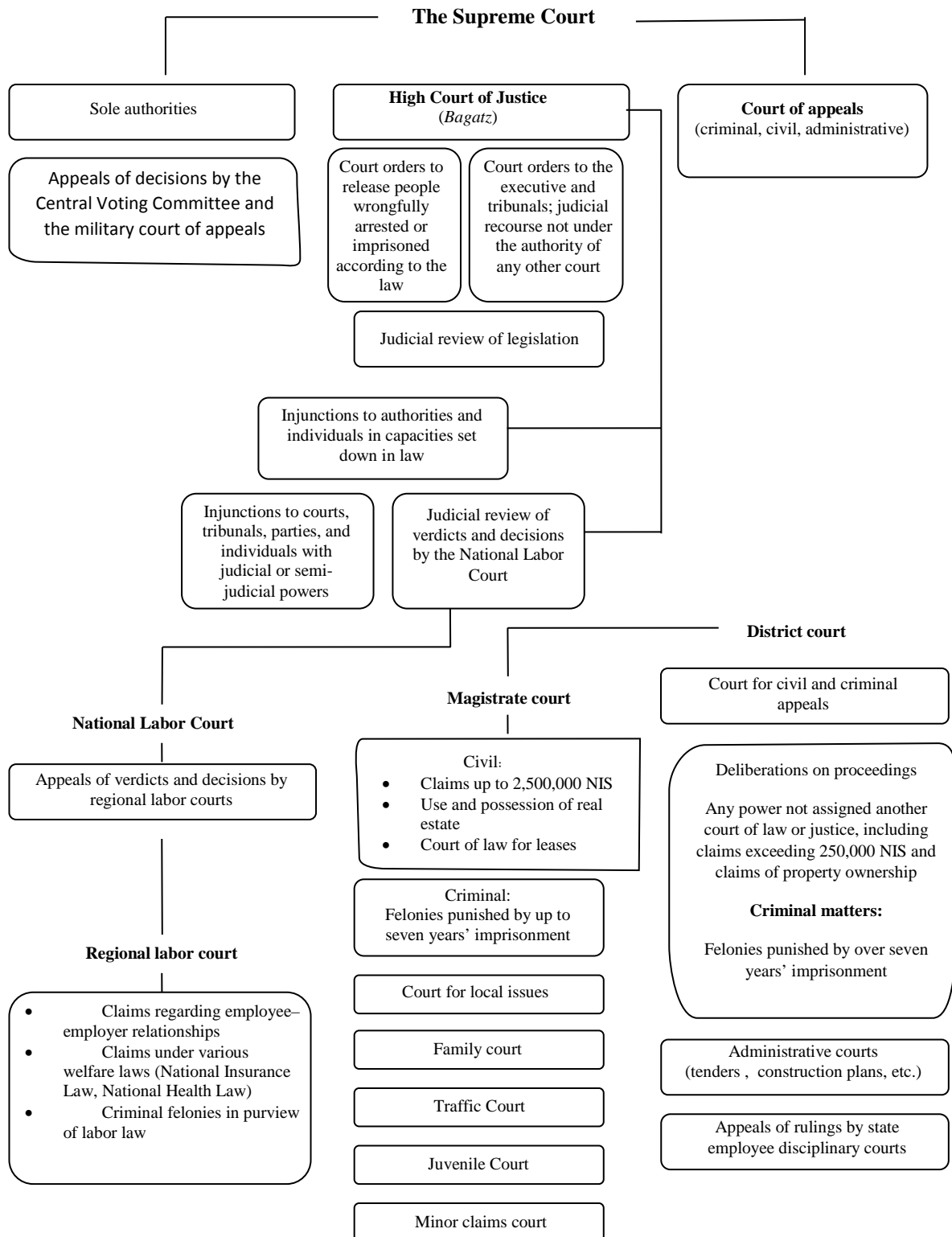
In addition to the above, the Israeli judicial system includes five regional labor courts, which respectively serve the districts of Jerusalem, Tel Aviv, Haifa, Nazareth, and Be'er Sheva' (Labor Courts Order [Establishment of Circuit Courts] 1969), and the National Labor Court, which is located in Jerusalem (Labor Courts Law 1969 [LCL], section 1).

A regional labor court has sole authority to judge, *inter alia*, complaints by employees against their employers and complaints arising in negotiations towards the signing of a contract to form an employee–employer relationship (LCL, section 24).

The National Labor Court has sole authority to judge, *inter alia*, complaints among parties to a collective agreement and regarding the existence, content, interpretation, execution, or breach of a collective agreement, as well as appeals of verdicts and other decisions handed down by the regional courts (LCL, sections 25, 26).



**Figure B: The structure of the Israeli judiciary as described in the Israel Judiciary Report of 2009** (source: IJR, 2010)



**Table 3: Activity of Israeli courts, 2007–2014**

Year \ Case	Opened	Closed	Inventory
2007	690,824	704,828	472,020
2008	658,022	666,378	454,598
2009	671,857	659,172	473,229
2010	700,837	716,390	469,500
2011	711,256	740,031	458,847
2012	704,230	742,684	446,839
2013	724,345	752,927	440,850
2014	744,630	764,089	443,439

The above data refer to main cases (LawNet, the new case management system introduced to the Israeli court system in 2007, accounts for only main cases and does not contain corresponding data regarding motions).

## **1.8. The Israeli Criminal Justice System**

### **1.8.a. Introduction**

Three judicial methods are widely accepted in the modern world: the inquisitional method, the adversarial method, and the popular justice method (Vogler, 2005).

The judicial systems of the Anglo-Saxon world and Israel follow the adversarial method, under which the system is essentially binary and possible outcomes may be characterized in terms of *either–or*. The legal process is a zero-sum game (Marshall, 1972; Eisenberg, 1976). A trial typically is conducted by the parties, while the judge is passive. The parties take polar, opposing positions, and the outcome of the trial usually entails one winner and one loser (Alroai, 1993). The aspiration of each stakeholder thus is to win the trial.

Application of judicial rule in an adversarial system also is regulated by the binary principle: the judge is limited by the law in his available choices for recourse in a given case (Alroai, 1993).

During the trial, many nontangible considerations are not taken into consideration (e.g. mutual respect, the human need for acknowledgement and a feeling of significance, the need for equality and security (Risnik, 1982).

### **1.8.b. Criminal Law**

The criminal trial establishes the parameters by which the criminal justice system operates (Allen, 2003). The two primary sources of criminal law are substantive criminal law (SCL) and procedural criminal law (PCL).

Substantive criminal law includes penal laws, penal codes, and fundamental principles of criminal jurisprudence. Procedural criminal law includes criminal procedural rules, narrowly defined, and evidentiary law (Gross, 1979).

Following are the fundamental principles at the foundation of penal jurisprudence, which mold the way in which the content of criminal laws expresses the needs of society as well as its perceptions of the defense foundations through the criminal justice system (CJS) and its essential values in a given country and at a given time:

1. The principle of legality (*nullum crimen sine lege*), according to which there can be neither felony nor punishment unless the law in question was valid on the date of the possible felony and applied to the particular jurisdiction in which it occurred. There must be no retroactive punishment (Hall, 1960; Feller, 2000; Williams, 1961). In Israel, the principle of legality is set forth in section 1 of the Penal Law 1977 (PL).
2. There likewise must be no punishment for thoughts or feelings. There can be no felony without behavioral action by an individual that is visible and directly noticeable by another person. In other words, there is no punishment for mere intentions (Feller, 2000).
3. There is no felony without guilt (*nullum crimen sine culpa*). The weight of this principle does not vary according to the type of criminal felonies, with the sole exception of double liability (PL, sections 20–22; Feller, 2000).
4. Each felony is accorded a punishment that is commensurate with its severity. The felony and its punishment must be in keeping with the public's consciousness of the fundamental values of its society, and the distinction between good and bad and what is permitted and what prohibited. With criminal law, the legislator records and

gives legal sanction to the good and the bad as viewed by general societal morality. Unfamiliarity with penal law does not afford exemption from criminal liability (Feller, 2000).

5. There is no felony without a minimum level of danger to the public. Legislation of a felony is intended to protect the social value of safety: commission and recurrence of the felony might harm this value. The law is not intended to provide protection from minor problems (*de minimis nun curat lex*; Feller, 2000; PL, section 34(q)).
6. There is no felony when the offender is not fit to stand trial. The offender must have the ability to understand the physical and social meaning of his behavior in light of reality, nature, and society, and thus be capable of behaving according to their codes (Feller, 2000, pp. 62–74; PLS, section 34(h)).
7. There is no felony when the action was not performed of free will. There must be an objective possibility between making the evident basis of a felony and abstention from making it (*actio libera in causa*; Feller, 2000, pp. 74–100; PL, section 34(l)).
8. An individual is not to be punished for a felony in the absence of imputed liability (*respondeat superior*; Feller 2000; PL, sections 17–23).
9. Realization of criminal liability is the interest of the sovereign. The state is the prosecutor in criminal proceedings (Feller, 2000, pp. 108–115; Moyle, 2001; Harel, 2008; HCJ 2605/05 *Civil Rights Division v. Minister of Treasury* [unreported], decision of Nov. 19, 2009).

There is no unanimity regarding the role and objectives of criminal law in general and penal laws in particular in a modern democratic society (Ashworth, 2009). According to Ashworth, the objectives and functions of criminal law are as follows:

1. Deterrence and prevention (the Theory of Deterrence; see also Pease, 2002).
2. Retribution (the Theory of Desert and Proportional Harm).
3. Rehabilitation (the Theory of Rehabilitation).
4. Restorative justice (the Theory of Restorative Justice).

Allen noted that the objectives of punishment in criminal law are retribution, including revenge and denunciation (the idea of retribution is based on the philosophy of Kant), deterrence, incapacitation, and rehabilitation (Allen, 2003).

Gross argued that the objectives of the criminal justice system (CJS) are:

1. Social criticism: Criminal law establishes felonies and punishments. Criminal law serves to protect society and the rule of law. The criminal felony is a violation of social norms, and the convicted criminal should be punished. The penal procedure constitutes the state's reaction to the felony. The objectives of punishment are deterrence, retribution and prevention (Gross, 1975).
2. Moral criticism: Crime is morally wrong, and thus punishing crime is morally right. The principle of consensus is the foundation of society. The sovereign is the public, which selects its representatives. The state, as legislator, legislates laws, which represent the people's will, and a criminal felony violates this body of law. It is moral to punish the criminal according to penal law. The felony also violates the social balance, and the criminal thus violates his civic duty to observe the laws and the rule of law. It is moral to put him to trial and punish him. The commission of a felony in and of itself is moral justification for punishment, regardless of the morality of the felony committed (Gross, 1979).
3. Criminal justice as a feature of removal and correction (Gross, 1979).

According to Wilson (2003), penal law protects the interests of the public and the interests of the individual, and the objective of criminal law is to protect the individual's interests, collective interests, or state interests by means of penal trial and a punishment that fits the crime and the circumstances of the offender (thus protecting the public from unjust use of criminal law by the state).

Jareborg (1995, pp 24–26) proposed that the *defensive model* of penal law, whose objective:

Protecting individuals against power abuse, against abuse of state power, excessive repression in legal or illegal forms, as well as against abuse of private, informal power, of which “lynch justice” is the most obvious form. One could say that an important purpose is to prevent

spontaneous social control, and replace it with formalized social control. The scope of protection includes not only suspected offenders but also, e.g., witnesses.

A central feature of this version of criminal law is that it aims at calming down conflicts and emotions. Legal certainty and justice are values that must not be subordinated to perceived needs for crime prevention. The defensive model does not regard state power as necessarily benevolent.

The distinguishing features of the defensive model as presented here concern principles for criminalization, procedural safeguards and principles for sentencing.

Regarding principles for criminalization, ten principles have been selected as the most important:

- A crime presupposes that a legitimate interest or value, capable of concrete specification, is violated or threatened.
- A crime presupposes that the offender is morally responsible for his deed. Criminal responsibility presupposes culpability.
- A crime consists in a separate event of wrongdoing (an evil or a bad deed). The criminal law is directly concerned with an act or omission, and only indirectly concerned with the offender.
- Criminalization must be general, it must concern types of deeds; it must not concern particular cases or individuals.
- The crime types must be defined by statutory law, i.e. in general norms easily accessible to the public.

- The crime type descriptions must be understandable and determinate.
- Retroactive criminalization to the detriment of the defendant is not allowed.
- The degree of reprehensibility for the crime type should be reflected in the attached penalty scale (or maximum penalty).
- Punishment is society's most intrusive and degrading sanction. Criminalization should accordingly be used only as a last resort or for most reprehensible types of wrongdoing.

The general threat of punishment as reflected in actual sentencing (the level of repression) should not be more severe than what is proved necessary for keeping criminality at a tolerable level.

A consequence of respecting these principles is that criminalization acquires a pronounced value-expressive function. The penal law may be seen as a list of worldly sins, of socially sanctioned basic moral demands.

A further, very important aspect of the classical criminal law concerns procedural safeguards, primarily:

- The existence of independent courts.
- The prohibition of retroactive application to the detriment of the defendant.
- The prohibition of analogical application of the law to the detriment of the defendant.
- The placing of the burden of proof on the prosecutor.
- Requiring proof beyond a reasonable doubt.

- Providing for access to independent legal counsel.
- Allowing appeals on both conviction and sentence.
- Providing for judicial reviews of pretrial detention, etc.

As far as sentencing is concerned, in the classical criminal law it is, of course, guided by the principles of proportionality (between crime and punishment) and parity (between the punishments for equally reprehensible crimes). The courts cannot have an independent function in “combatting” crime, even if there is some room for a general change of the repression lever (for general-preventive reasons) without legislation. As I have mentioned above, and will do again below, the defensive model demands that punishment be used parsimoniously, and that excessive suffering be avoided.

The American Law Institute (ALI) published a statutory text in 1962, entitled *The Model Penal Code* (MPC), whose purpose is to aid legislators in revising and standardizing penal codes in the United States.

Section 1.02 of MPC states that:

The general purposes of the provisions governing the definition of offenses are:

- a. To forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
- b. To subject to public control persons whose conduct indicates that they are disposed to commit crimes;
- c. To safeguard conduct that is without fault from condemnation as criminal;
- d. To give fair warning of the nature of the conduct declared to constitute an offense;



- e. To differentiate on reasonable grounds between serious and minor offenses.

In the State of Israel, the objective of the penal code is to protect the social values that are essential for the proper functioning and development of society in accordance with the concepts of social life in a modern enlightened society (Feller, 2000,; Crim. A 6696/96 *Cahana v. State of Israel*, *Israel Law Review* 1 [1988] 535, 550; HCJ 11339/05 *State of Israel v. Be'er Sheva District Court* [unreported], decision of Oct.8, 2006).

The social contract, which is the foundation of the democratic state, advocates respect of human rights, assuming that in order to assure the existence of a liberal and enlightened human society, there is need for public order and a sovereign to safeguard it. A strong socio-political structure is the only guarantee of the fulfillment of human rights and human development. The state is responsible for the existence of a normative system that regulates and defines the codes specifying which human behaviors are permissible and which forbidden, and is to enforce these codes in order to protect the social order (Hart, 2008).

The CJS protects the interests of the individual, the general public, and the state. In order to achieve these ends, the state is given powers of investigation, custody, trial, punishment, imprisonment, pardon and parole. The appropriate balance between the sovereign power exercised against the individual for the sake of safeguarding public interests and the human rights of each individual is the heart and soul of substantive democracy (Crim. FH 10987/07 *State of Israel v. Cohen* [unreported], decision of Mar. 2, 2009).

Israeli criminal procedure, defined broadly, consists of a number of stages: detention and investigation, prosecution, trial, punishment and imprisonment, appeal, parole, and pardon (HCJ 2605/05 *Human Rights Division v. Minister of Treasury* [unreported], decision of Nov. 19, 2007; HCJ 697/96 *Movement for Quality Government in Israel v. Attorney General* [unreported], decision of Jun. 8, 1997; Crim. A 7165/07 *X v. State of Israel* [unreported], decision of Apr. 12, 2010).

The Israel Police force is the main investigative body in Israel, and is charged with investigating criminal felonies in general, and felonies regarding public service in particular (Police Ordinance [New Version] 1971 [PO]; Criminal Procedure Law [Investigation of Suspects] 2002 [CPISL]; HCJ 531/79 *Likud Chapter of City of Petah*

*Tikvah v. Council of Petaḥ Tikvah*, *Israel Law Review* 2 [1980] 566, 576; HCJ 8192/04 *Movement for Quality Government in Israel v. Prime Minister of Israel*, *Israel Law Review* 3 [2005] 145, 152–153; Criminal Procedure [Consolidated Version] 1982 [CPL], section 59).

The responsibilities of the Israel Police are to prevent and expose felonies, apprehend criminals and put them to trial, safeguard prisoners; and maintain public order and the safety of people and property (PO, section 3; HCJ 2557/05 *Mat'a Harov v. Israel Police* [unreported], decision of Dec. 12, 2006).

An Israeli police officer on duty is authorized to detain a person suspected of a criminal felony and arrest him with no need for a court order if there is reasonable suspicion of the commission of a criminal felony and the rationale for imprisonment is that there is no alternative to imprisonment (PO, section 5; Criminal Procedure Law [Enforcement Powers: Arrest] 1996 [CPLEPA], section 23; Criminal Procedure Ordinance [Testimony] 1927 [CPTO]).

A police officer similarly is authorized, inter alia, to search any house or property if he has reason to believe that a felony is being committed there, with no need for a court order (Criminal Procedure Ordinance [Arrest and Search] [New Version] 1969 [CPASO], section 25).

It bears emphasis that in addition to section 3 of PO, which grants the Israel Police powers to investigate felonies, there are special provisions in other statutes that grant specific investigatory bodies authority to investigate felonies with relevance to certain matters and areas as defined in those statutes. An example of such powers to investigate includes the power to pursue investigations within the military, as specified by the Army Service Law 1955, the power of investigation concerning various financial matters (e.g. income tax, value-added tax, and customs), as specified in the Income Tax Ordinance [New Version] 1961, section 135, the Value-Added Tax Law 1976 (VATL), sections 108–110, and the Customs Ordinance [New Version] 1957 (CO), Chapter XII and the power to pursue investigations regarding securities, as specified in the Securities Law 1968 (SL), section 2.

The prosecutor in Israeli criminal trials is the state, which is represented by a duly authorized prosecutor who conducts the prosecution (Criminal Procedure Law

[Consolidated Version] 1982 [CPL], sections 11, 12). The exception to this rule is that procedural complaints are argued by private prosecutors (CPL, section 68).

In addition to the above prosecutors, whose role was defined in section 12 of CPL, there are *special prosecutors*, individuals charged by certain statutes with serving as prosecutors for the purposes of such statutes, e.g. military prosecutors in proceedings governed by the Military Service Law 1955 and those governed by the Security Ordinance (Emergency Stipulations) 1945.

Once the police investigation has concluded, the relevant material is passed on to the prosecution. In the case of felonies defined in Israeli law as belonging to the class of *pesha*, i.e. those carrying a penalty greater than three years' incarceration (PL, section 24(a)), all materials from the investigation are submitted to the relevant district attorney. The same goes for felonies defined as *avon*, i.e. those carrying a punishment of imprisonment of more than three months and not more than three years (PL, section 24(u)). Yet another similar case is the case of a crime punishable only by a fine, if the fine exceeds that which may be issued for a felony the rate of whose fine has not been established (PL, section 24(u)), and which is under the supervision of the regional attorney.

In the case of *avon* felonies not under the purview of the district attorney and felonies whose punishment is a period of incarceration not exceeding three months or a fine not exceeding the maximum fine for a felony the rate of whose fine has not been established (PL, section 24(c)), material from the investigation generally is passed on to the police prosecution (CPL, section 60).

A prosecutor to whom the investigative material has been submitted has four options:

1. To put the suspect to trial, i.e. to serve the accused with an indictment for a felony, if the investigation has produced sufficient evidence to prove commission of a felony, unless he feels that the trial is not in the public interest (CPL, section 62(a); HCJ 687/78 *Levi v. Justice Bohovez*, *Israel Law Review* 1 [1979] 389, 391).
2. To shelve the material on the grounds that the trial is not in the public interest, with the agreement of duly authorized officials (CPL, section 62(a)) or in the case of sex crimes or violent crimes between spouses, in accordance with the provisions of section 62(a) of CPL.

3. To close the case on the grounds that there is insufficient evidence to obtain an indictment and there is no justification for continuation of the interrogation (CPL, section 62(b); HCJ 7256/95 *Fishler v. Commissioner of Police*, *Israel Law Review* 5 [1996] 1, 7–10).
4. To close the case on the grounds that the party is not guilty (CPL, sections 62(b), 64(a)). If the prosecutor decides to put the defendant on trial, he must submit an indictment to a court in the appropriate region authorized to deliberate on the given felony (CL, sections 40, 51; CPL, section 6).

The attorney general is authorized to amend the indictment at any point before the beginning of the trial (CPL, section 91). Once the trial has begun, the indictment may be amended only with the consent of the court (PL, section 92).

The attorney general is authorized to withdraw the charges leveled in the indictment against one defendant or more at any point once the trial has begun. In the event that the defendant already has confessed, whether in writing or in answers provided during the trial, to facts that are sufficient to convict him, the prosecutor may withdraw charges only with the consent of the court (CPL, section 93). Withdrawing charges from the indictment before the defendant pleads effects annulment of the indictment, causing the defendant to be cleared of all relevant charges. With the consent of both defendant and plaintiff, the indictment may be annulled at any stage of the trial before the issuance of a verdict (CPL, section 94).

Procedures may be postponed at the initiative of the court or at the request of the prosecutor at any point after the indictment is served and before the verdict is given if it transpires that the defendant cannot be brought to the remainder of his trial (CPL, section 94a).

Once an indictment has been served, the court sets a date for a trial and summons the prosecutor and defendant (CPL, section 95). If a defendant who has been summoned does not appear, the court may issue an order requiring him to do so (CPL, section 99). Under special circumstances, after the indictment is issued, preliminary testimony may immediately be collected from an individual (CPL, section 11).

In effect, the criminal proceedings are the legal proceedings, narrowly defined. The stages of the process include the reading of the indictment (the opening of the trial), determining guilt, issuing a verdict, and appeals (CPL, Chapter V).

Unless otherwise specified in CPL, no person may be judged unless he is present (CPL, section 126). In exceptional cases, one may be judged in absentia (CPL, sections 128, 130, 132).

In criminal law, the protocol prepared should reflect all that has been said and done during the trial and with regard to it (CPL, section 134).

At the opening of the trial, the court reads the indictment aloud to the defendant, who is not represented by an attorney (CPL, section 143). If necessary, the court explains to the defendant the rights that he has with regard to his defense (CPL, section 145).

Once the trial has begun, the parties may at any point during deliberations reach agreement on certain facts, validity of evidence, and the manner of their submission (CPL, section 144).

Once the trial has begun, before any other argument has been made, the defendant may move for a mistrial by arguing that the judge is unfit to hear the case (CPL, section 146).

Often enough, once the trial has begun, the defendant is permitted to offer preliminary arguments, e.g. lack of territorial or material jurisdiction, a flaw or error in the indictment, an argument that the facts as presented in the indictment do not indicate any felony, acquittal or conviction for an act described in the indictment, double jeopardy, felony limitations, and parole (CPL, section 149).

If the indictment is not annulled in preliminary argumentation, the court asks the defendant how he pleads to the charges. The defendant then is permitted to respond to the indictment or to remain silent. In his answer, the defendant may admit to all of the facts in the indictment or to some of them, or deny all or some of them. If the defendant declines to respond, this may be used by the prosecution to bolster its case. At this point, the defendant may offer an alibi, claiming to have been elsewhere at the time of the alleged offense (CPL, section 152).

It bears emphasis that if the defendant admits to the facts of the indictment, whether in writing prior to the beginning of the trial or orally after it begins, he may at any stage of the trial retract his confession in whole or in part (CPL, section 173).

If the defendant does not admit to the facts in the indictment, then an inquiry into the facts of the matter begins, and the prosecution brings its evidence before the court (CPL, section 156). When the prosecution has presented its evidence, the prosecutor announces that the prosecution rests its case (CPL, section 157).

If by the time the prosecution rests its case guilt has been neither proven nor alleged, the court acquits the defendant (CPL, section 158). If the defendant is not acquitted under section 158 of CPL, he may bring evidence in his defense before the court (CPL, section 159). The defendant may either testify as a witness in his own defense or abstain from testifying. If he chooses to testify, he does so at the beginning of the presentation of the evidence in his defense, unless the court decides otherwise (CPL, section 161).

By choosing not to testify, the defendant may buttress the evidence presented by the prosecution (CPL, section 162). After presenting his evidence, the defendant announces that the defense rests its case (CPL, section 164). Given the permission of the court, an interested party may present additional evidence once the defense has rested its case (CPL, sections 166, 167, 169).

If the defendant is unable to stand trial due to mental illness, the court ceases legal proceedings against him (CPL, section 170). After giving evidence, the parties—first the prosecution, then the defense—may summarize their arguments concerning the guilt of the accused (CPL, section 169). At the conclusion of the inquiry, the court issues a verdict (CPL, sections 181(a), 182). The court acquits the defendant if guilt has not been proven beyond a reasonable doubt. If it finds the defendant guilty, it convicts him of the felony with which he is charged by the indictment (CPL, section 32).

Under special circumstances, the court is authorized to convict a defendant of additional felonies that do not appear in the indictment (CPL, section 184).

If the court convicts the defendant, then the parties—first the prosecution, then the defense—present evidence relevant to punishment (CPL, sections 187–189), including any relevant probation report (CPL, sections 191–191a; PL, sections 37–38). When both

parties have presented evidence, they may summarize their arguments regarding punishment, first the prosecution, then the defense (CPL, section 192).

The court is authorized to vacate cancel a conviction up to the point when the sentence is handed down (CPL, section 194(a)).

After arguments concerning the penalty are made, the court sentences the defendant (CPL, section 193). The conviction and the sentence together form the verdict (CPL, section 195).

Modes of punishment in criminal law and maximum sentences for the various felonies are governed by Chapter VI of PL. A court that has convicted an accused party may give him any punishment that does not exceed that specified for the given felony (PL, section 35).

The modes of punishment in Israeli criminal law are imprisonment (PL, sections 41–52(l)). A court that has sentenced the accused to active imprisonment not exceeding six months determines whether he will serve the entire time or part of it, or else perform community service (see PC, section 51b), whether the prison sentence should be suspended (PL, sections 52–60), whether a fine should be added to the sentence (PL, sections 61–71), or whether the prison sentence should be changed to community service (PL, sections 71a–71b).

If the court convicts a defendant but does not sentence him to active imprisonment, it is authorized to obligate him to perform *community service*, on his own time and without payment, for a period of time determined by the court, instead of or in addition to any other punishment (PL, section 71a). In general, the period of community service does not exceed one year (PL, section 71b).

*A commitment to avoid criminal activities* (PL, sections 72–76). A court that convicts a defendant is authorized, in addition to the sentence given, to order the defendant to *commit to avoid criminal activities* for a period determined by the court and not exceeding three years. As security for the commitment, an amount is specified that does not exceed the amount of the fine imposed for the felony.

*Compensation and expenses* (PL, sections 77–81). The court is authorized to order the convicted party to compensate the victim in accordance with the extent of damage caused to the latter. The court may require a convicted offender to bear the expenses of

the trial, including witnesses' expenses (PL, section 80), and may require the state or the prosecutor to bear the expenses of a defendant who is acquitted (PL, sections 80- 81).

*Community treatment* (PL, sections 82–86). The court is authorized to serve a defendant who used hard drugs with a probation order under which he is obligated to undergo community treatment (PL, section 82). If a defendant is convicted of a violent crime towards a family member, the court is authorized to serve him with a probation order under which he is obliged to undergo community treatment (PL, section 86).

*Probation order.* The court is authorized to serve a defendant whose guilt has been proven with a probation order, regardless of whether he has been convicted, after receiving a probation report. The probation order is valid for a period of 6 months to 3 years. The court is authorized to cancel or annul a probation order at the request of one of the parties, or in service of the probation, and set down a punishment other than probation, including convicting the defendant that has not been determined preliminary (Probation Ordinance [New Version] [1969] [PO], sections 1–26).

The defendant or plaintiff is entitled to file an appeal of the verdict delivered in a criminal trial with the Court for Appeals. An appeal of a verdict by a district court is filed with the Supreme Court, while an appeal of a verdict by a court of justice is filed with the district court (CPL, section 198; CL, section 40(c); PLJ, sections 15(b), 17).

Permission may be requested to appeal a verdict given by a district court to the Supreme Court.

A capital sentence must be deliberated upon even if the defendant does not file an appeal (CPL, section 202). In general, the appellant is the first to give his arguments, followed by the respondent (PL, section 210). The appellate court is authorized to accept the appeal in whole or in part, and may alter the verdict, annul it, give another in its stead, remand the case to the lower court with instructions regarding the verdict, dismiss the appeal, or render any other decision in keeping with its authority (CPL, section 213).

To complete this picture of Israeli penal law, it bears note that there are special legal regulations governing felonies that carry fines (CPL, Chapter VII). Also of note is that Israeli criminal law does not hold a person liable for an act he committed if he is less than 12 years old (CPL, section 34F). A special normative agreement governed by the



Juveniles Law (Judgment, Punishment, and Treatment: Methods) 1971 (JLJPT) regulates the judgment, punishment, and means of treating a child offender, including an adult who was not 18 on the day of the indictment.

JLJPT (sections 2–8) established the juvenile courts of law and specified that a minor may be tried for a criminal act only by a juvenile court. As a rule, juvenile court deliberations are conducted in chambers (JLJPT, section 9).

Special regulations govern the arrest and release of minors (JLJPT, sections 10–13). There also are special regulations governing juvenile courts (JLJPT, Chapter IV) and special penalties and other modes of treating minors (JLJPT, sections 24–41).

### **1.8.c. Imprisonment**

An individual who has been convicted of a criminal offense and sentenced to active imprisonment serves his time in an Israeli prison established in accordance with the law (Prisons Law [New Version] 1971 [PO], sections 2–10, 69).

A prisoner held in an Israeli prison is under the legal custody of the prison warden and is subject to the discipline and rules of that prison (PO, section 11).

A prisoner is entitled to file an administrative petition with the district court of the jurisdiction where he is imprisoned concerning any issue relevant to his imprisonment or arrest (PO, section 62a). At the time that he enters the prison, the prisoner is deprived of his freedom and mobility as well as other rights whose deprivation results from imprisonment. The prisoner does not, however, lose his legal right to human dignity (HCJ 355/79 *Katalan v. Israel Prison Service*, *Israel Law Review* 3 [1980] 294, 298; HCJ 337/84 *Hokma v. Minister of Interior*, *Israel Law Review* 2 [1984] 826, 832; PAA 4663/94 *Golan v. Israel Prison Service*, *Israel Law Review* 4 [1996], 136, 156).

The Israel Prison Service (IPS) is a security organ with a social mission that is part of the Israeli law enforcement system and responsible for imprisonment in Israel. The IPS (2009) asserts that its role is “to incarcerate prisoners and detainees in a safe and appropriate manner while safeguarding their dignity, fulfilling their basic needs, and implementing the right tools for each prisoner, in order to improve their ability to acclimate in society once released. This is done with the cooperation of various institution and community actors.” As of 2009, twenty-nine incarceration facilities (prisons and detention centers), located throughout three regions—north, center, and

south—were under the responsibility of the IPS (IPS, 2009). According to the IPS (2001–2002), over the course of several years there was a steep and significant rise in the number of prisoners, as well as in the manpower employed by the IPS and the IPS budget.

#### **1.8.d. Parole**

The Conditional Release from Prison Law 2001 (CRFPL) normatively regulates a prisoner's conditional release. It establishes that if a prisoner sentenced to a period of imprisonment exceeding three months and not exceeding six months has served at least two-thirds of his sentence, the prison commissioner may permit his conditional exemption from the remainder of the sentence if the commissioner believes that the prisoner is worthy of release and that his release would not pose any danger to the public welfare (CRFPL, section 2).

If a prisoner sentenced to more than three months' incarceration but not life imprisonment has served at least two-thirds of his sentence, then a parole commission may, at his request, authorize his conditional exemption from the remainder of the sentence if it believes that he is worthy of conditional release and does not pose a danger to the public welfare (CRFPL, section 3).

Authority to conditionally release a prisoner sentenced to life in prison who has been imprisoned for more than twenty-five years belongs to a special parole commission (CRFPL, sections 4, 5). This commission also is authorized to conditionally release a prisoner due to medical considerations (CRFPL, section 7).

As a rule, when a commission deliberates on the conditional release of a prisoner, it considers the degree of danger his release is expected to pose to the public welfare, including the welfare of his family, the welfare of the victim of the offense, the security of the state, the likelihood that he has been rehabilitated, and his behavior while in prison (CRFPL, sections 9-10).

In the case of crimes committed by the prisoner against a family member that are violent in nature or are felonies described in section 10 of Chapter VIII of the Penal Law, the commission may not decide to recommend the conditional release of the prisoner prior to obtaining the opinion of the district committee on domestic violence

concerning the degree of danger that release of the prisoner would pose to the public, including the victim of the offense (CRFPL, section 11).

The commission may decide to recommend the release of a prisoner serving time on account of sex crimes or who is mentally unstable only after obtaining a professional opinion from a mental health center according to which the prisoner does not pose a danger to the public. If a prisoner who has been conditionally released commits an additional felony during probation, the commission cancels his release and orders him to serve an additional period equal to or less than that during which he was unimprisoned. If the prisoner is not sentenced to imprisonment for the additional felony, the commission may permit the continuation of parole (CRFPL, section 20).

The commission is authorized to annul a prisoner's conditional release if he violates any of the terms of the release (CRFPL, section 21).

Any of the parties (i.e. the prisoner and a representative of the legal consultant to the government) may file an administrative appeal with the district court in whose jurisdiction the prisoner is held regarding the decision of the IPS commissioner or the commission. A decision of the district court may be appealed to the Supreme Court under circumstances specified by the latter (CRFPL, section 25).

A special parole commission may, at the request of a prisoner serving a life sentence, or the Minister of Justice, recommend that a life sentence be mitigated or commuted by the President of the state (CRFPL, sections 29–30).

If the special parole commission finds that a prisoner serving a life sentence for killing the Prime Minister was motivated by ideology or political views, it will not recommend that his punishment be reduced or commuted.

#### **1.8.e. Clemency**

The President of Israel is authorized, inter alia, to pardon a criminal and to mitigate his punishment by “decreasing the punishment or commuting it” (Basic Law: President of the State 1964 [BLPS], section 11(b)), as well as to pardon an individual even prior to conviction (HCJ 428/86 *Barzilai v. Government of Israel*, *Israel Law Review* 3 [1986] 505, 518).

On the pardon form, the President must be countersigned by the Prime Minister or the Minister of Justice (BLPS, section 12).

The fundamental principles governing the presidential power to exercise clemency, as well as the general criteria for exercising this authority, have been established in a number of verdicts given by the Supreme Court of Israel. It has been established that the power to pardon is “part of the texture of our democratic lives” and is to be interpreted liberally” (FH 13/60 *Attorney General v. Matana*, *Israel Law Review* 1 [1962] 430, 442).

In furnishing an interpretation of the power to pardon, one must take into account the ruling method, the judicial model, and the legal tradition, as well as the purpose of the Basic Law regarding the office of the President of the State. The presidential power to pardon is unique, independent, basic, and not of prerogative characteristics. The authority is subject to checks, e.g. the countersignature of the Minister of Justice (HCJFH 219/09 *Justice Minister v. Zoher* [unreported], decision of Nov. 29, 2010).

The power to pardon is unique and special. It is a power to judge. The President of the State is permitted to consider facts that are outside the confines of written law. In exercising this power, he is entitled to take into account grace and mercy, which conceal the fundamentals of forgiveness and pardon, along with other considerations relevant to the welfare of the public (Sheleff, 1998).

The Supreme Court is empowered to examine the legality of pardons issued by the President. These legal reviews are unique, and are not rules which are applied critically upon the actions of the judicial authorities (HCJ 706/94 *Ronen v. Minister of Education*, *Israel Law Review* 5 [1999] 389, 414–415).

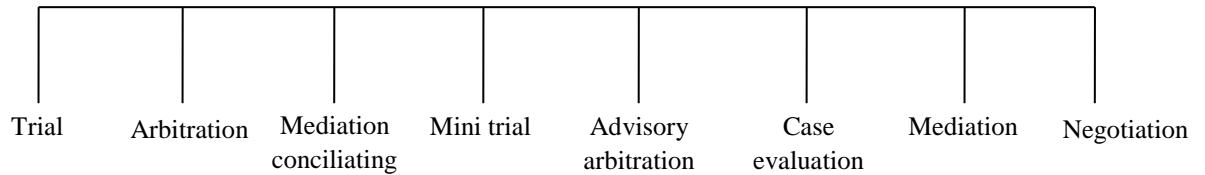
### **1.9. Appropriate/Alternative Dispute Resolution (ADR)**

Spangler (2003) defines ADR thus:

Alternative Dispute Resolution (ADR) is a term generally used to refer to informal dispute resolution processes in which the parties meet with a professional third party who helps them resolve their dispute in a manner that is less formal and often more consensual than is done in the courts.

ADR (whether referring to a movement, an idea, or a school of thought) is concerned with seeking out suitable conflict settlement mechanisms that parallel the conventional legal system. It seeks not an alternative to courts of law, but new models and techniques for settling disputes.

**Figure C: ADR-proposed models of conflict resolution**



The mediation and arbitration models are those most commonly employed (Meroni, 1999).

A number of factors enhanced the status enjoyed by ADR—primarily mediation and arbitration—during the second half of the previous century. First was the governments' inability to contend with various types of conflicts, such as the long-running dispute regarding ownership of American Indian reservation lands, the rebellion by prisoners in Attica Prison (in the United States), community disputes between different religious and ethnic groups, and uprisings by minority groups against the prevailing system in general and the legal system in particular. Second was the lengthiness and great expense of legal procedures, which inherently limited trial proceedings, and the heavy caseload imposed on judges. A legal ruling is an inappropriate tool for addressing ongoing conflictual relations, and the same goes for conflicts whose resolution requires intimacy, rather than publicity, complex conflicts, such as those involving multiple parties and multiple issues, conflicts requiring complex and creative solutions not included in the limited set of tools available to the court, conflicts in which decisive exercise of judicial power might cause a grave problem come the time for enforcement and conflicts in which issuance of a verdict is not sufficient to resolve the real dispute (Meroni, 1999; Sander, 1985; Cappelletti, 1982).

### **1.9.a. Restorative Justice (RJ) Theory**

Restorative justice is a theory of justice (Ness et al., 2001) that offers a unique perspective on the criminal act, the consequences of the act, and means of responding to the act. It is a process that incorporates the interested parties concerned by the felony in determining how to right the wrongs by restoring the injuries caused by the criminal act (Zehr, 2002). According to the restorative justice approach, a criminal felony fundamentally is an injury done to people and relationships: these are the actual victims of the act (Cornwell, 2007). The criminal act is not merely a violation of criminal law that does injury to the state, but also causes injury to the victim and the community. It creates a conflict between the offender and the victim, resulting in injuries to the victim, the community, and even the offender himself. Restorative justice thus seeks to restore these damages by settling the conflict after gaining an understanding of the needs created by the felony.

This goal is achieved when all parties affected by the felony reach a fundamental agreement, by means of dialogue, regarding the actions that the offender and the community ought to take to address these needs. Identifying the injuries suffered by the victim mainly takes the form of fulfilling the victim's emotional, social, and material needs, within the context of safeguarding the security, welfare, and values of the community. In addition the process must take into account the need for the reintegration of the offender within the community. A pre-condition for restoration of damages is that the offender admit to committing the crime, as well as that all involved be sincerely willing to take part in the restorative justice process, which is voluntary in nature. The offender must agree to perform acts restoring the damage he has done by committing the felony, e.g. apology, financial compensation, services to the victim, community service, and participation in a treatment program (Farkash, 2002).

The community is responsible for instilling peace within itself, and must do its part to restore the injuries resulting from the felony. It thus should offer assistance to the victim and the offender while taking into consideration their different needs, the consequences of the felony, and the need to reintegrate the offender in the community.

In practice, three archetypal models of restorative justice have evolved: victim–offender mediation (VOM), conferencing, and circles. Each model details a procedure to be

executed. De facto, restorative justice procedures which are based on the first two models are the most common.

VOM is a process that facilitates an open dialog between the victim and the offender, conducted through a neutral third party who serves as mediator. All parties thus can deliberate on the felony, its causes, its circumstances, and its consequences, as well as participate actively in settling the conflict brought about by the felony.

Conferencing is rooted in the customs of the Maoris of New Zealand. In the event of a conflict involving minors, they would bring together the minor who had committed the felony, his family, and his friends, and the victim of the offense and his supporters to formulate an agreed plan to restore injuries caused by the offense, settle the conflict, and restore peace to the community. This model has given rise to the creation of various consultative models in which minors who have committed a felony come together for *family deliberation groups*. Such models recently have been applied in various countries, e.g. Australia, England, the United States, and Canada (Farkash, 2002). When the offender is an adult, the model is designated *community deliberation groups*.

The circles model was used in the past for children from various parts of the world, including by the American Indians of the northern United States and Canada. The offender, the victim, interested community members, and the head of the tribe or one of his grandchildren participate in such a process. This model has led to the creation of variations, such as verdict circles, youth justice committees, therapeutic circles, and courts of law for peacemaking (Farkash, 2002).

Restorative justice activities are conducted by professional organizations and with the aid of mediators who have undergone appropriate training in restorative justice.

The successful execution of restorative justice processes is dependent on a number of fundamental conditions: agreement to the facts on the part of the offender, sincere participation by all relevant parties (the offender, the victim, and the community), secrecy and immunity of process and neutrality of restorative justice programs and the processes that are pursued through them.

The theory of restorative justice and its processes differ both materially and procedurally from the formal adversarial criminal procedure customary in Israel (Farkash, 2002). As noted previously, formal criminal procedure in Israel is concerned

with practice, with the questions of whether criminal law has been violated and by whom, and with punishing the offender. Its purpose is not to settle the *conflict* between the offender and the victim that came about on account of the felony—a conflict that may evolve into a more severe one, bringing about an additional, much graver felony. Fundamentally, the parties to the formal, adversarial legal process are the state and the offender. The purpose of the process is to determine the guilt of offenders and acquit the innocent, and having convicted an offender, to establish his punishment. Determination of an offender's guilt and sentencing are done by a duly authorized judge. The objectives of the punishment are retaliation, prevention, condemnation, individual and general deterrence, revocation of ability, rehabilitation, and compensation. The punishment should suit the crime, in terms of both the act itself and the personal circumstances of the offender. Formal penal procedure and the penal process generally are not intended to address the needs of the victim and restore peace to the community, and many difficulties thus arise with regard to reintegration of the offender within the community, due to his being labeled a criminal. There also is skepticism concerning the efficiency of the penal procedure in general and the purpose of punishment in particular. Restorative justice procedures, meanwhile, emphasise the needs of the victim of the felony and facilitate condemnation of the criminal act while paving the way to reintegration of the offender in the community. The procedures described above contribute to the ability of the community to restore peace and safety as well as to enhance solidarity within society and strengthen its values (Farkash, 2002).

The restorative justice approach does not pretend to be the ultimate alternative to formal criminal law. Notwithstanding, experience tells us that it offers newer, more efficient, and fairer practices for settlement of disputes brought about by a criminal act than those offered by formal criminal law.

RJ seeks to liberate CJS from what McElrea (2002a, 2002b) describes as the “shackles of the past” by making it conform more with human justice and considerably more likely to prevent repeat offenses (Cornwell, 2007, p.17).

Fiss (1984, p. 1075) opposed the use of ADR in conflict settlement as a substitute for judgment, arguing:

I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated



instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.

### 1.10. Sulha

The root of the word *Sulha* is *sulh*, which means *peace* in the sense of *making peace* (Ibin-mandor, 2003, p. 374) between two rivals and putting aside hatred and enmity. The concept is well known among Arab nations.

Generally speaking, Sulha is a conciliatory process extrinsic to the realm of formal law that is used in settling a dispute (generally a blood dispute) between the offender and his family or *hamula* (meaning *tribe* or *extended family*) and the victim and his family or *hamula* that was caused by a deviation from accepted standards of morality and normative criminal law.

The objectives of the process are to restore the injuries done by the offender to the victim and the community, to instill peace between rival parties, and to strengthen social solidarity.

This reparation is achieved principally by addressing the social and material needs of the victim of the offense, by guaranteeing the security, stability, legacy, values, and wellbeing of the community and by reintegrating the offender in the community. Mutual consent is the main principle governing decision-making in this process.

According to the tradition of Sulha, the offender and his extended family, or *hommes* (Elabadi, 1982, p.15) are held responsible for the victim, his *hamula*, and the community. Acceptance of responsibility entails, inter alia, acknowledgement by the offender of the damage done, his expression of sincere remorse for his actions, and his willingness (along with his *hamula*) to do anything possible to restore the injuries and to prevent (or at least minimize) future violations.

Restorative action, under a Sulha, mainly requires that the offender and his *hommes* financially compensate the victim and his *hommes* as specified by the Sulha committee, a group comprised of respected and notable community members that mediates between the rival parties (Ginat, 2000; Elabadi, 1986; Jabour, 1996; Hlahel, 2002).

During my tenure as a judge, I heard a lot of criminal cases. And in my capacity as a chairman of the Parole Committee, I heard a large number of requests for release on prisoner terms from their imprisonment. In some cases, a Sulha procedure was carried. Also, before I was appointed judge and when I had a law firm, I was a member of the J'aha (the Sulha Council) and participated in a number of Sulha proceedings. Here I will mention two cases. The first case occurred in 1996 in one of the villages in northern Israel. In 1994, a road accident occurred in which an 8-year-old boy was killed. The driver of the vehicle called "O" was charged with negligent manslaughter. The driver did not confess, did not take responsibility for the offense, and there was no Sulha procedure between him and the victim's family. A conflict between "O" and his family and the family of the victim of the offense - the "A" family- ensued in 1996. A fight broke out between the "O" family and the "A" family. Two brothers of the "A" family- "M" and "K" fired shots at the "O" family home. As a result of the shooting "O" was killed, and "O"'s brother was seriously wounded. The two brothers of the "A" family were tried for murder and serious injuries in the Nazareth District Court (c.c 521/97). In 2000, they were convicted and sentenced to life imprisonment. After "M" and his brother "K" entered prison, a Sulha process was conducted to resolve the conflict between the opposing parties: the members of the "A" family and the "O" family. I was a member of the Sulha Council. The chairman of the Sulha Council was the late *Shech* Salah Knaifas, who at the time served as the head of the national Sulha Council in Israel. The Sulha process was successfully concluded in 2003. A legal and valid Sulha agreement was signed, and on 10.10.2003 the Sulha ceremony took place, attended by thousands of people from all the communities in Israel, including public figures, judges, heads of local councils, religious leaders, academics and others. "M" and "K" and their family members paid to the victim of the offense and his family punitive damages of **NIS 400,000**, an amount equal to today **NIS 715,400**. Peace and reconciliation were achieved between the families of these offenders and the victim of the offense. To this day, there is peace and quiet between them. This case shows that the Sulha process solves a criminal dispute in the most optimal manner and brings peace and reconciliation between the parties to the offense: the offender, the victim of the crime

and the community. It can be argued that had the Sulha process been conducted between the two families after the killing of the minor son in the road accident in 1995, the conflict in which "O" was killed in 1996 would not have been occurred. The second case occurred in one of the villages in northern Israel in 1995. A businessman named "G" traveled with his partner "A" to a carpentry shop. When they reached the carpentry shop, they parked the car. The street was narrow. Suddenly, another vehicle was driven by "W" approached. An argument developed between "G" and "W" about a parking place. "W" went and called his three brothers, of which one was a minor named "M". There was a fight. "G" and "A" were injured. "G" was stabbed in the chest and was killed. The police investigated the incident. "W" and his three brothers, including "M" were first tried for murder. During the trial, a plea bargain was made, according to which the crime of murder was reduced to manslaughter. "M" admitted and was convicted of manslaughter and sentenced to seven years and three years' probation for three years. His three other brothers were convicted of an offense of aggravated injury with intent and were sentenced to two and a half years 'imprisonment and three years' probationary imprisonment for a period of three years. The victim family claimed that the police investigation was negligent. They also objected to the plea bargain. They complained to the superiors of the police and their objection was rejected. The family was very angry at the police who disseminated false information about the deceased "G". A Sulha procedure was instituted among the defendants, "M", "W" and their two other brothers and their family and "G" and his family. I was the lawyer who represented the late "G" family and accompanied the family in the proceedings. Sulha was made by the J'aha. Thousands of people participated in the Sulha, including public figures, members of parliament, academics, judges, businessmen, educators and the like. The family of the victim of the crime received punitive damages of **NIS 300,000**, and peace and full reconciliation were made between the parties to the crime: the offenders and their families, the victim of the crime and his family and the community. This case shows that the criminal procedure did not do justice to the the victim and his family. Only the Sulha procedures did justice to them, and the victim's family was compensated, as much as possible, for the loss of her son "G'.

### 1.10.a. Origins of Sulha

The Sulha process is of ancient origin, rooted in the customs that prevailed among the Bedouin tribes of the Arabian Peninsula in the Jahalya Era (Dark Era, i.e. that preceding Islam; Jabour, 1996).

The Quran (the holy book of Islam), which regulates, inter alia, relations between a man and his fellow peers and between man and God, established the religious and legal legitimacy of Sulha, as well as required Islamic judges (*qadhi*) to favor consensual *tsulah* as the preferred process for settling conflicts, as opposed to *alkadaah*, a compulsory legal solution. There are four primary sources of Islamic law: the Quran, the Suna (dicta of the prophet), *elaa'gmaa'* (consensus of the Islamic community), and *alqias* (syllogism) (Abu-zahra, 1987; Goiten and Ben-shemesh, 1957; Bechor, 2002; Meron, 2001; Kamali, 1997).

The prophet Muhammad required that heretics settle conflicts amongst themselves using the Sulha process.

The Quran commands us:

No good is there in much of their private conversation except for those who enjoin charity or that which is right or conciliation between people. And whoever does that seeking means to approval of Allah—then We are going to give him a great reward. (Quran, Surat Al-Nisa [The Women] 4:114)

And if a woman fears from her husband contempt or evasion, there is no sin upon them if they make terms of settlement between them, and settlement is the best ... (Surat Al-Nisa 4:128)

*Surat Al-Hujrat (The Rooms)* 49:9 further states that “if two factions among the believers should fight, then make settlement between the two.”

Even the prophet Muhammad insisted on the unique quality of *tsulah* as a means of reconciliation between rivals in society, asserting that “a peace treaty between Muslims

is permitted, except one that forbids that which is permitted [under Islam] or one that permits that which is forbidden” (Elgazairi, 1976).

In reference to the persona of a liar, the prophet Muhammad asserted that “a lying man is not accustomed to making peace between men, to imbuing goodness, or to telling the truth” (Elboh’ari, 2003, p. 561). When the prophet Muhammad heard of a dispute that had broken out among the men of Kobaa, he instructed his entire entourage, “Let us go there and make peace between them” (Elboh’ari, 2003, p. 561).

#### **1.10.b. Sulha in *El-Hudaebiya***

In the year 628, the prophet Muhammad and his followers planned to travel to Mecca at a time other than the *Hajj* (pilgrimage; one of the five central commandments of the Quran). The leaders and priests of the Koryesh tribe, who had not yet converted to Islam, faced a dilemma. On one hand, they feared the intentions of the prophet of Islam, and on the other, they could not prevent the visit. There was an agreement between the two parties that had developed into the first peace treaty in Islam, called *Tsulah El-Hudyebiya*. Under the terms of this peace treaty:

- a. There was to be a truce between the Muslims and the members of the non-Muslim Koryesh tribe for a period of 10 years.
- b. Every Muslim was to be permitted to fulfill the Hajj commandment or to visit Mecca freely during a time other than the Hajj (*El-Omra*), and any member of the Koryesh tribe was to be permitted to enter the Muslim-controlled city of Almedina freely on his way to Egypt or the El Shaam region (Syria, Jordan, Lebanon, Palestine).
- c. A member of the Koryesh tribe who wished to convert to Islam without the consent of his *apatropous* (*valya*) would not be permitted to do so. A Muslim was to be permitted to leave Islam and join the Koryesh people. Individuals who belonged to neither party were to be permitted to choose freely to join either the Muslims or the Koryesh people.
- d. The prophet Muhammad and his believers were not to enter Mecca in the year 628. They were to be permitted to do so from 629 onward, under the condition that they bore no arms, with the exception of sheathed sabers and other such weapons, and stayed in Mecca no more than three days (Elnawawi, 2003).

The preceding intimates that this was the source of the institution of Sulha as a conflict settlement mechanism, and that Islam acknowledged it and gave it juridical and religious sanction.

### **1.10.c. Types of Sulha**

The various types of Sulha processes are classified according to a number of parameters: the identity of the rivals, the severity and outcome of the offense, the obligation, and the manner in which the Sulha ceremony is conducted.

It is customary to distinguish between two main types of Sulha. First is *sulah a'am* (general public Sulha), which generally concerns longstanding conflicts between two large tribes or two types of tribes, and serves to solve the conflict by making peace and putting aside hatred and loathing with *El-Hofar* and *El-Defan* (burial of hatred and loathing). This type of Sulha also is implemented in the case of blood conflicts, primarily cases of murder. The Sulha ceremony is a *public* one, and the Sulha treaty binds both the individual and the community.

The second main type, *Sulah El-Mahdud* (the limited Sulha), usually is employed in a minor conflict between two rivals who are acquainted (from the same tribe) or two individuals from different tribes, such as a quarrel or financial dispute, in which the felony and the offender are well known. The objective of the Sulha is to prevent acts of vengeance by the victim and his tribe against the offender, his tribe, and his hommes (Elabadi, 1986,; Khadduri, 1997).

### **1.10.d. Stages of Sulha and Its Foundations**

I believe it would not be incorrect to say that practical application of the Sulha process is not identical in all places where it holds sway (Elabadi, 1986; Abu-Hassan, 1987). However, one can identify a number of generally accepted stages and characteristics, detailed in the subsections that follow (Elabadi, 1986; Irani, 1999).

#### **1.10.e.1. Referral to the Jaha**

Immediately upon the emergence of a dispute, it is referred to the *jaha* (Sulha committee), usually by the offender or a member of his family. A delay in referral is seen as indicative of disparagement and disrespect toward the victim and his tribe, and may harm the chances of a successful Sulha process. A *jaha* member should be well

known, highly respected, very honest, of great integrity, trustworthy, completely neutral, and able to bring rivals together and make peace between them.

### **1.10.e.2. Jaha Assembly**

The assembled jaha contacts the rival parties, investigates the dispute and its causes and attempts to solve it quickly, effectively, and diplomatically following consent to the Sulha process by the relevant parties.

### **1.10.e.3. Atwa Commitment (Hudna)**

*Atwa* is a commitment to a truce (*hudna*) by the victim and his family for a set period of time. It is done in writing and in the presence of witnesses and guarantors. The *atwa* includes the following main elements: the date of the contract, the names of the parties, including the victim, the offender, and the *hommes* of each, the place where the contract is signed, the appointment of guarantors and their names, the names of the witnesses, the signatures of the injured party, his representatives, the guarantors, the witnesses, and sometimes the representative of an official authority (e.g. the police) and any limitations.

There are a number of different types of *atwa*:

1. *Atwat forret eldam* (hot blood *hudna*) is pursued in a case of murder, when tensions between rivals are extremely high. The victim's side has a strong desire to avenge the blood of the dead, while on the side of the offender there are constant worry and fear of revenge.

This type of *atwa* is given on the day of the murder and has a length of three-and-one-third months (from that day). The rule is that any member of the family (on the level of the *hommes*) may issue it, but in practice it is the sheikh or the head of the family who does so. In the eighties of the previous century, the *atwa* would last a week or several months, depending on the circumstances of the given case. Nowadays the custom is to issue such an *atwa* for a period of three months with the possibility of an extension, depending on the extent of success and the progress of the Sulha process leading up to the Sulha ceremony. *Atwat foret eldam* has two objectives: to calm the parties to the dispute and safeguard property and lives, and to give the offender and his family a fair chance to choose of their free will to exile themselves to a different community. If they do

not leave of their free will, exile is forced upon them. The *jaha*, and in certain cases the authorities (e.g. the police) force the felon and his family to depart for a different community until the time of the *Sulha* ceremony.

2. *Atwa amnya* (obligation to security) is a commitment made by the authorities (e.g. police) to the offender and his family that no harm will be done to them for a period of three months. This type of *atwa* is practiced in Jordan.
3. *Atwat hak* (obligation to clarify rights) may be issued by only one of the parties to the dispute or by both. It states that there will be no act of vengeance by one against the other until the close of the factual and legal inquiry. This type of *hudna* is used in conjunction with an inquiry into the privileges and obligations of both parties.
4. *Atwat sharaf* (obligation to honor) usually is issued in a dispute centered on a felony concerning family honor (cases of sex crimes and particularly rape, invasion and trespassing in a private home, injury of an individual who is under protection and in custody, considered a grave insult to the protector).
5. *Atwat aadyah* (customary obligation) is given in mild disputes involving minor felonies (not murder, rape, harm to a giver of patronage, etc.) usually involving bodily injury.
6. *Atwat hai-met* (alive-dead obligation) is given when the victim of the crime has been critically injured and his life is in danger, or when the victim is missing and his fate is unknown. When the truth becomes known, a new *atwa* is issued in accordance with the circumstances of the case.
7. *Atwat imhael* (obligation to postpone and arrange the *Sulha* treaty) is given before *atwat ikbael* (acceptance of the *Sulha* process). Its objective is to allow the *jaha* and the offending party to complete the final stages of the *Sulha* negotiations successfully and sign or accept the final agreement.
8. *Atwat ikbael* indicates acceptance of the *Sulha* process by the parties to the dispute and the obligation of each party to fulfill the terms of the *Sulha* agreement as established by the *jaha*. This type of *atwa* remains in force indefinitely.



*Frash el-atwa* (the hudna platform) is a sum of money paid by the family of the offender to that of the victim when the atwa is given, and is considered one of its conditions. Such a sum generally is paid in cases of severe quarrels stemming from acts of murder or rape, and is a type of financial compensation offered by the offender and his family. In addition to serving as a punishment, the payment achieves the social aim of providing immediate financial support to the victim and his family, which has particular relevance in the case of a death (Jabour, 1996; Elabadi, 1986).

#### **1.10.e.4. Negotiations**

With the grant of *atwat el-ikbael*, the jaha launches direct negotiations between the parties with the purpose of establishing the conditions of the Sulha agreement, arriving at a final and exhaustive solution to the dispute, and making peace between the rivals. In pursuit of this purpose, the members of the jaha conduct separate meetings with each party until the point of the Sulha treaty (Jabour, 1996; Irani, 1999; Hlahel, 2002).

#### **1.10.e.5. Treaty and Sulha Ceremony**

The Sulha ceremony is the final stage of the Sulha process. According to Bedouin tradition, *tsulakh* is *saayed el-ahkam* (the best judgment; Elabadi, 1986, p. 81).

#### **1.10.f. Fundamentals of the Sulha Treaty and Ceremony**

The fundamental elements of the Sulha agreement are as follows:

1. It is made between two rivals, and its purpose is to settle the dispute in a final and exhaustive manner, and to facilitate a sustainable peace.
2. Settlement of the dispute, peace-making, and reconciliation are done with the consent of both parties, with the rivals signing the treaty in the presence of witnesses.
3. The treaty specifies the time and place of the Sulha ceremony. It is permitted to conduct the ceremony at the home of the victim, another private home, the home of a community member of note, or a public place. In practice, the ceremony takes place at the home of the victim or at a public place in the center of the community.
4. The offender and his family invite the audience, community members of note, and representatives of the official authorities to participate in the ceremony.

5. The Sulha treaty includes a written confession by the offender and his family (up to the level of the *hommes*) to the criminal act in which they accept responsibility for the action and express willingness to pay the victim and his family *aldya* and other relevant expenses. *Aldya* (ransom money) is an amount specified by the *jaha* that the offender and his family must pay the victim and his family compensation for the felony.
6. In the Sulha ceremony, all of the guests, the members of the *jaha* first among them, are invited to the home of the offender. The *jaha* members then make their way to the location where the victim and his family have gathered (usually the home of the victim or his father) and request the consent of the victim or his representatives before proceeding with the ceremony.

Once consent has been granted, the members of the *jaha* return to the home of the offender and inform those present of the acceptance of the Sulha, then invite them to the home of the victim, to which they proceed. The journey to the victim's residence is performed on foot, with the offender carrying aloft the *raaya*, a stick to which a white cloth is affixed, which represents the Sulha. The family of the victim offers hospitality to the offender and his family and all others invited. A *musaafaha* then takes place: the offender and his family and the victim and his family shake hands and, in the tradition of some Arabs, drink bitter coffee.

At this point the speeches begin. Several notable community members offer words whose main purpose is to promote peace, conciliation, unity, good virtues, tradition, the value of community, praiseworthy virtues of the victim's family, and so forth.

Next comes the tying of the *raaya*, signifying conciliation, peace, and friendship between the parties to the dispute and their families (up to the level of the *hommes*), and the *musaamaha* (pardon), granted by the victim and his family to the offender and his family for the offense. The first person to participate in the tying is the head of the victim's family. Upon doing his part of the tying, he publicly announces the willingness of the victim and his family to make peace with the offender and his family. The chair of the *jaha* then addresses the family of the victim and says, "You have forgiven and pardoned the party by tying the first knot on the *raaya*, and in the name of the merciful God, I ask to tie the *raaya* in order to make true and sustainable peace, which will

obligate the present members, the absent members, and those to whom you shall give birth, and we, the members of the jaha, are guarantors of this peace.”

The chair of the Sulha committee then gives the aldy to the family of the victim, without counting the money. It bears note here that the aldy serves a number of purposes: financial support, punishment and deterrence, and social. It is a tool of corrective justice that seeks to restore the status quo through payment of money or property to the victim and his family. It punishes the offender, especially when the sum is extremely high (*dyat eben el-am*), which obligates him to undergo the humiliation of obtaining money from strangers outside of his tribe and thus damages his honor. It also enhances solidarity and mutual responsibility within the families, as each member of the offender’s *hommes* participates in the burden of collecting money for the aldy, as well as helps to cultivate each member’s civic ethics and solidarity with the community.

A number of rules and conditions govern the aldy. First, it is compensation for damage in the form of a payment of money or of livestock, property, or other assets to the victim and his family. Second is the damages caused by the actions of the offender against *haak el-hayat*- the right to life and bodily wholeness. Third, its payment is part of the process of a final, binding Sulha accepted by the rival parties. Fourth, it applies to groups: the compensator, *el-jaani vehamusato* (the offender and his *hommes*), and the receiver, *el-mujna alya vehamusato* (the victim and his *hommes*; this condition is customary in Jordan). Fifth, it is paid in a lump sum rather than in installments. Sixth, there are guarantors of its payment.

When the tying of the raaya has been completed, the family of the offender invites that of the victim and all guests participating in the ceremony to a *mumalaha* (meal) conducted at the home of the offender. The origin of the word *mumalaha* is *Melakh*, meaning *salt*; the sense is that the two families together eat bread and salt, an act that symbolizes their reconciliation and the signing of a sustainable peace treaty. After the Sulha ceremony, the family of the offender return from exile to their homes, while the victim pardons and forgives the offender and annuls all pending legal proceedings in the event that he has pursued such (Elabadi, 1986; Jabour, 1996; Irani, 1999; Hlahel, 2002).

### **1.10.g. Sulha in Professional Legal Literature in Israel**

I have found only four sources in Israeli professional legal literature that discuss Sulha. Shapiro (2006) argues that a Sulha should be given significant weight in the Israeli criminal process although it is not an alternative to criminal proceedings (Shapiro, 2006). Hlahel (2002) opines that Sulha should be incorporated in the criminal mediation model. However, Hlahel (2002) does not specify conditions, a form, or a model for incorporating Sulha in the Israeli criminal process.

Tsafrir (2006) argues that the Sulha is a part of Arab customary law. According to her customary law, murder and bodily harm are torts, not a crime. In other words, such acts belong in the realm of private law and not in the realm of criminal law.

She also argues that the Sulha agreement often influences the Israeli judges' decisions during criminal proceeding against the accused. This influence tends to work in favor of the accused - mainly in decisions about detention and sentencing - but when a Sulha agreement affects the verdict, it tends to work against the accused.

Additionally, the weight attached to the Sulha by the Israeli courts has some problematic aspects: it may cause the accused to force a Sulha agreement upon his victim and lead to perversion of the course of justice.

Finally, she argues that recognition by Israeli courts of the Sulha can have ramifications that may not be to the courts' liking. At the same time, total rejection of Sulha agreements as an argument or as argument in court, because of their problematic aspects, may also not be desirable. After all, Sulha is a part of peace-making, and as such, it promotes social goals.

Tsafrir's claim that the Sulha Institution is part of the customary Arab law that belongs to the civil private law sector and not the criminal law is not correct. Tzafrir examined a number of Sulha agreements that were examined by the Israeli courts. This study and its conclusions are different. In this study and its conclusions, the Sulha Institution will be incorporated into the Israeli criminal procedure. The study focuses on the incorporation of the Sulha institution into the Israeli criminal procedure, where the procedure is carried out in accordance with the provisions of the law by qualified J'aha who is appointed by the State. The procedure is done with the full consent of those involved: the offender, the victim of the offense and the community. If the process is successful, a valid and binding Sulha agreement will be signed. There will be no defects in the process

of making and signing the agreement, such as fraud, coercion, oppression, deception, and the like. The Sulha agreement also requires the approval of the court, and will meet the needs, interests and rights of all those who were affected by the offense: the offender, the victim of the offense and the community.

Pely (2016) argues that Israel's formal legal system does not accord any official recognition of any kind to the Sulha, nor does the court have any official or even quasi-official policy designed to deal with the Sulha and its interaction with the formal system.

Under certain circumstances, the courts allow the Sulha to play a role that has a direct bearing on the outcome of legal proceedings. As a matter of procedure, courts tend to systematically ignore Sulha agreements as a consideration in their overall decisions. Israeli courts' decisions exhibit a mixed approach to the Sulha process and agreements as a significant consideration. In some categories (e.g. plea bargain and sentencing) the courts' decisions are not significant. For other categories (e.g. appeal on detention and appeal on verdict), the courts' decisions are significant. There are several possible reasons for the mixed attitude that Israeli courts exhibit toward the Sulha. First, the absence of an official policy, combined in some cases with a lack of clear understanding by the judiciary of the role of the Sulha in Arab culture in general, and in dispute resolution in particular. Second, argues Pely (2016) are the introduction of changes in attitude toward Sulha, resulting from an evolution of attitude towards victim rights in Israel, in both legislation and court behavior. Third, evolving attitudes of Israeli society and of the courts towards the country's Arab community. If the Sulha contributes to peace making and public safety, and such it serves the obvious interests of both the state and the community. In this case the courts will probably want to encourage and advocate it. Yet, the very same Sulha has no official standing. So by advocating it or by giving it a significant weight in legal decisions, the courts may be indicating to the Sulha makers and the Sulha using population that the institution has a quasi-official status within Israel's legal system.

Finally, Pely's argument that granting legal status to Sulha in Israeli criminal law causes inequality before the law is significantly doubted and contested. According to the study and its findings and the proposed law draft (**Appendix F**), the Sulha will be incorporated into the Israeli criminal law and will be part of it. The criminal law in Israel applies to the entire territory of the State of Israel. It equally applies to all

citizens and residents living in the State of Israel: Jews and non-Jews (Muslims, Christians, Druze, Bedouins, Circassians, etc.). All are equal before the law, and there will be no discrimination, in this matter, between Jews and non-Jews.

### **1.11. Summary**

The State of Israel was established in 1948. It has a Jewish majority and an Arab minority (20.7%). Israel is defined as a democratic state, and DESI stresses that Israel is founded on the fundamental principles of freedom, justice, and peace: a state in which all inhabitants are to enjoy equality of social and political rights, along with freedom of religion, conscience, language, education, and culture. Unfortunately, feelings of discrimination and deprivation are widespread amidst the Arab population of Israel.

The judicial model used in Israel is the adversarial model. Criminal trials establish the parameters according to which the criminal justice system operates. The two main sources of criminal law are substantive criminal law (SCL) and procedural criminal law (PCL). The CJS safeguards the interests of the individual, the general public, and the state. In order to achieve these ends, the state is given powers of investigation, custody, trial, punishment, imprisonment, pardon, and parole. Israeli criminal procedure, defined broadly, consists of a number of stages: detention and investigation, prosecution, trial, punishment and imprisonment, appeal, parole, and pardon.

ADR is a “term generally used to refer to informal dispute resolution processes in which the parties meet with a professional third party who helps them resolve their dispute in a manner that is less formal and often more consensual than is done in the court” (Spangler, 2003).

Generally speaking, Sulha is a conciliatory process extrinsic to the realm of formal law that is used in settling a dispute (generally blood disputes) between the offender and his family or hamula and the victim and his family or hamula that was caused by a deviation from accepted standards of morality and normative criminal law. The objectives of the process are to restore the injuries done to the victim and the community by the offender, to instill peace between the rival parties, and to strengthen social solidarity.

The professional literature reviewed indicates that Israeli criminal law does not recognize Sulha as a dispute resolution mechanism.

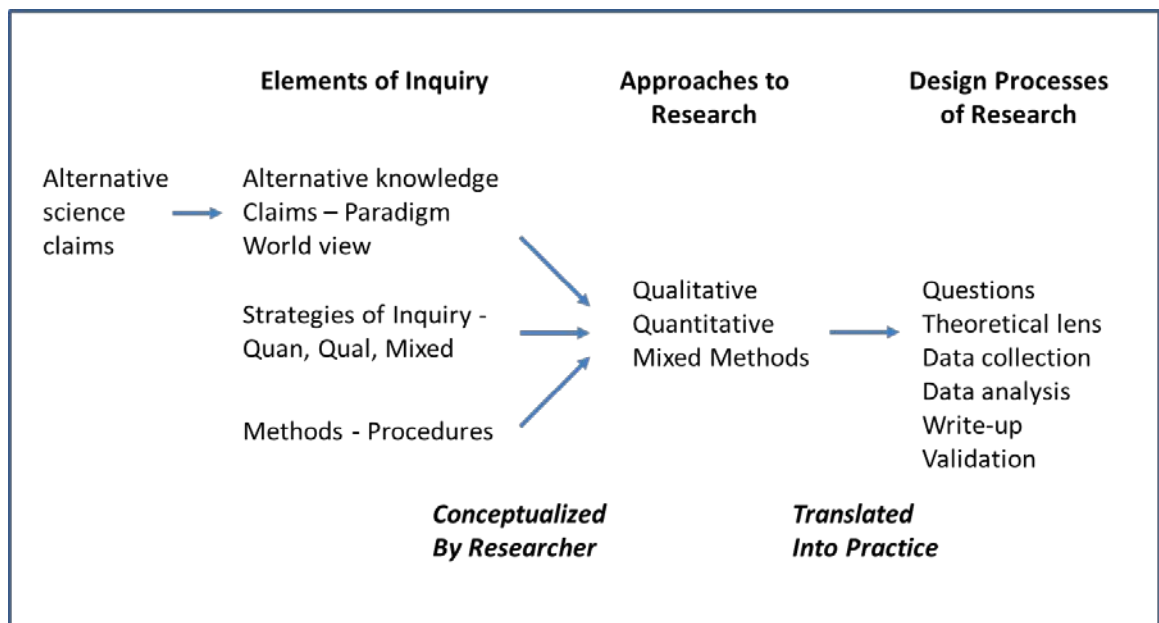
## Chapter Two: Research Design and Methodology

### 2.1. Introduction

This chapter discusses the philosophical assumptions of this study that form its basic framework. After a variety of common philosophical assumptions were reviewed, presented, and analyzed, the constructive-interpretive paradigm was identified as most appropriate and was chosen as the framework of the study.

This chapter also discusses research methodologies and design, including strategies, instruments, and methods for collecting and analyzing data.

The science claims, knowledge claims, strategies, and methods of inquiry leading to approaches and the research design process are presented in Figure D below.



**Figure D: Science claims, knowledge claims, strategies of inquiry, and methods leading to approaches and the design process** (source [except science claims]: Creswell, 2003).

The study was designed and conducted as a social research. In terms of philosophy and as a social researcher, I am a constructivist.

The research design of this study is a qualitative case study methodology. Multiple qualitative methods were used: interviews, a Delphi process, documents were analysed, professional experience was examined, and a personal diary was kept. The justification

for each of the methods of data collection and analysis designed and used in the study was thoroughly discussed. Key appropriate criteria for scientific qualitative research were presented and discussed in order to ensure the credibility of the study.



## **2.2. Research Methodology and Methods**

The knowledge claims, strategy of inquiry, and methods of data collection and analysis in an inquiry all contribute to the characterization of a research approach as qualitative, quantitative, or a mixed qualitative–quantitative approach (Creswell, 2003). According to Meyers (2009), research methodology is a strategy of inquiry that moves from underlying philosophical assumptions (knowledge claims) to research design and data collection.

Research methodology was defined by Leedy and Ormrod (2001, p. 14) as “the general approach the researcher takes in carrying out the research project.”

Typically, methodology is a research strategy that translates ontological and epistemological principles into guidelines that show how to conduct research well (Sarantakos, 2005), and provides principles, plans, procedures, and practices to govern research (Marczyk, Dematteo and Festinger, 2005).

The quantitative approach and the qualitative approach are based on two different and largely contradictory paradigms (Tuli, 2010).

Quantitative and qualitative research approaches investigate and explore different claims of knowledge. Each methodology is intended to address a specific type of research questions. Where the quantitative approach provides an objective measure of reality, the qualitative approach allows the researcher to explore and better understand the complexity of a reality (Williams, 2007).

### **2.3.a. Quantitative Research Approach**

Different scholars give various definitions of *quantitative research*. Below is a review of several of these.

Creswell (2009, p. 21) defines the quantitative approach as:

One in which the investigator primarily uses postpositive claims for developing knowledge ... employs strategies of inquiry such as experiments and surveys, and collects data on predetermined instruments that yield statistical data.

Meanwhile, according to Cohen and Manion (1980):

Quantitative research is defined as social research that employs empirical methods and empirical statements. An “empirical statement” is defined as a descriptive statement about what “is” the case in the “real world” rather than what “ought” to be the case.

Quantitative inquiry creates meaning and new knowledge, particularly by surveying and experimenting. It builds upon existing theory. The methodology of a qualitative inquiry maintains the assumptions of an empiricist paradigm. The inquiry itself is independent of the researcher. Data thus are used to measure reality objectively. Quantitative inquiry begins with the statement of a problem, then proceeds to the formation of a hypothesis, a literature review, and quantitative data analysis. The findings of a qualitative inquiry may be predictive, explanatory, or confirmatory (Williams, 2007).

Quantitative research is used to test an objective theory (Creswell, 2009), which commonly requires the researcher to collect numerical data and analyze them statistically (Punch, 2005).

### **2.3.a.1. Quantitative Research Methodology**

Quantitative research involves collection of scientific evidence (data) so that the information may be quantified and subjected to statistical treatment to support or refute “alternative knowledge claims” (Creswell, 2003, p. 153; Williams, 2007). Data collected typically is numeric. The researcher uses mathematical models in his data analysis methodology, and uses appropriate research methods to ensure compliance with statistical data collection methodology (Williams, 2007).

Leedy and Ormrod (2001) suggest three broad classifications of quantitative research: descriptive, experimental, and causal-comparative. Creswell (2009) proposes two alternative strategies of quantitative inquiry—experimental designs and non-experimental designs—as survey methods for conducting quantitative research.

### **2.3.b. Qualitative Research Approach**

Qualitative research is a holistic approach that emphasizes discovery (Williams, 2007). Creswell (2009, p. 21) defines the qualitative approach as:

One in which the inquirer often makes knowledge claims based primarily on constructivist perspectives (i.e. the multiple meanings of individual experiences, meanings, socially and historically constructed, with an intent of developing a theory or pattern), or advocacy/participatory perspectives (i.e. political, issue-oriented), or both. It also uses strategies of inquiry such as narratives, phenomenologies, ethnographies, grounded theory studies, or case studies. The researcher collects open-ended, emerging data with the primary intent of developing themes from the data.

Various knowledge claims, strategies of inquiry, and methods of collecting and analyzing data are employed in qualitative research (Creswell, 2003). Qualitative (or constructivist, interpretive, historical, or postmodern) purists assert that reality is subjective, multiple, and socially constructed by its participants (Tuli, 2000; Lincoln and Guba, 2000; Amare, 2004; Krauss, 2008). Qualitative methodology is predicated on interpretivist epistemology and constructionalist ontology (Tuli, 2010). Meanings thus are embedded in the experience of the participant, and these meanings are mediated by the researcher's own perceptions (Merriam, 1988).

Qualitative research focuses on discovering and understanding the experiences, perspectives, and thoughts of participants, which is to say that it explores meaning, purpose, or reality (Hiatt, 1986).

Qualitative research builds its premises on inductive, rather than deductive, reasoning.

Domegan and Fleming (2007) stress that qualitative research aims to explore and discover issues concerning the phenomenon at hand because very little is known about that phenomenon. It uses "soft data" and obtains "rich data."

There are several strategies of inquiry (types of research, or categories of research designs) associated with the qualitative research, none of which enjoys universal consensus (Denzin and Lincoln, 2005).

Leeds and Ormrod (2008) suggest five strategies of inquiry in qualitative research: ethnography, grounded theory, case studies, content analysis, and phenomenological

studies. Creswell (2003) also lists five strategies of inquiry: ethnographies, grounded-theory studies, case studies, phenomenological studies, and narratives.

Creswell (2003) describes six phases embedded in each strategy:

1. Philosophical or theoretical perspectives;
2. Introduction to a study, including its purpose and research questions;
3. Data collection;
4. Data analysis;
5. Report composition;
6. Standards of quality and verification.

### **2.3.c. Ethnographic Research**

An ethnographic study is concerned with an entire group that shares a common culture (Leedy and Ormrod, 2001). According to Creswell (2009), in ethnographies “the researcher studies an intact cultural group in a natural setting over a prolonged period of time by collecting primarily observational data. The research process is flexible and typically evolves contextually in response to the lived realities encountered in the field setting.”

Ethnography is a qualitative study approach that lends itself to the study of the beliefs, social interactions, and behavior of small societies. It involves participation and observation over a relatively long period of time, and interpretation of the data thus collected (Denzin and Lincoln, 2011; Reeves, Kuper and Hodges, 2008). It is bound up with the lived experience of the ethnographer (Berry, 2011). Such a study aims to provide meaning for the culture under study. The strength of ethnography lies in the use of multiple methods, a flexibility that allows for change as research continues over time. The study process includes collection of data in the form of field notes, documents, audio-visual material, and cultural artifacts; analysis using such techniques as interviews (both individual interviews and group interviews); and informal dialogue (Naidoo, 2012).

### **2.3.d. Narrative**

Some scholars argue that postmodernism succeeded the modernist philosophy that assumes rationality and universal truth and seeks to apply empirical scientific methods to problem solving (Michell and Egudo, 2003). Postmodernism emphasizes “contextual construction of meaning and the validity of multiple perspectives; knowledge is constructed by people and groups of people. Reality is multi-perspectival; truth is grounded in everyday life and social relations; life is a text, but thinking is an interpretive act; facts and values are inseparable; and science and all other human activities are value-laden” (Ferrier, 1998, in Michell and Egudo, 2003).

Narrative is multidisciplinary, an extension of the interpretive approaches to the social sciences. It is ideal for qualitative inquiry due to its suitability for collecting the rich data within stories. In narrative, the researcher tell the story of the informant (Michell and Egudo, 2003).

Narrative also is known in the literature as *storytelling*, *sense-making*, *narrative and organization*, *narrative and organization studies*, *stories*, *discourse analysis*, *organizational learning*, and *organizational decision making* (Michell and Egudo, 2003).

According to Creswell (2003), narrative research is a form of inquiry in which the researcher studies the lives of participants and asks one or more of them to provide stories about their lives. This knowledge then is retold, or re-storied, by the researcher as a narrative chronology. In the end, the narrative combines views from the life of the participant with those of the researcher’s life in a collaborative narrative.

### **2.3.e. Grounded Theory Research**

Grounded theory is a methodology for constructing a theory regarding issues of importance in peoples’ lives (Strauss and Corbin, 1998) through a process of data collection and analysis that often is described as inductive in nature (Morse, 2001) because the researcher has no preconceived ideas to prove or disprove (Mills, Bonner and Francis, 2006).

The grounded-theory approach is a systematic social science methodology that emphasizes discovery of theory through analysis of data (Faggiolani, 2011). Creswell (2003, p. 16) defines grounded theory by stating that the “researcher attempts to derive a

general, abstract theory of a process, action, or interaction grounded in views of participants in a study.”

Grounded-theory research begins with data, which develop into theory (Leedy and Ormrod, 2001). Williams (2007, p. 69) clarifies that grounded-theory research is “the process of collecting data, analyzing the data, and repeating the process, which is the format called comparative method. The data can be obtained from several sources, such as interviewing participants or witnesses, reviewing historical videotapes or records, observation while on-site.”

According to Leedy and Ormrod (2001), the grounded-theory report has five dimensions: a description of the research question(s), a review of the literature, a description of the methodology, data analysis explaining the theory, and a discussion of the implications.

### **2.3.f. Phenomenological Research**

The roots of phenomenology lie with the Greek philosophers Plato, Socrates, and Aristotle, who suggest to understand phenomena (Fochtman, 2008; Abu Shosha, 2012).

The term *phenomenology* first was used by Immanuel Kant in 1764. The word is an umbrella term that encompasses both a philosophical movement and a range of approaches to research.

The German philosopher Edmund Husserl (1859–1938) is the founding father of phenomenology. The core assumption of phenomenology is that analysis begins not with the objective world “out there,” but with “mental directedness”: that which the mental is about, or directed to (Asbers, 2009).

Phenomenology, as a research strategy, is a descriptive study of the nature and meaning of phenomena. The focus is on how things appear to us through experience or in our consciousness, and the phenomenological researcher aims to provide a rich, textured description of lived experience. To pursue a phenomenological study is to “return to things themselves” (Husserl, 1970), with the term *things* in this context referring to the world of experience as it is lived (Finlay, 2008).

Phenomenology thus concentrates on understanding human experience as it is experienced by a person at the root of consciousness, prior to being interpreted or taken

for granted. Phenomenology seeks to look at things anew, and tries to explore what causes one to recognize a thing as the thing it is (Ilharco, 2004).

The aims of phenomenology are:

1. To gain a deeper understanding of and develop greater meaning for peoples' everyday experiences;
2. To direct the understanding of phenomena that are consciously experienced by people themselves as they are experienced (Ilharco, 2004; Leedy and Ormrod, 2001).

Van Manen (1990) believes that phenomenological study does not develop theory, but provides insight into reality and brings us closer to the living world.

The phenomenological researcher can ask questions concerning human experience such as: *What is this experience? What is this or that kind of experience? What is the essence of this phenomenon as experienced by people? What is the meaning of the phenomenon to those who experience it?* (Lavery, 2003; Van Manen, 1990).

Phenomenology may be categorized by type into descriptive phenomenology, created by Husserl, and interpretive-hermeneutic phenomenology, created by Heidegger. Notwithstanding, an overlap is assumed between the two types (Fuchtmann, 2008; Lavery, 2003).

Creswell (2003, p. 17) points out that in phenomenological research, "the researcher identifies the 'essence' of human experience concerning a phenomenon, as described by participants in a study. Understanding the 'lived experiences' marks phenomenology as a philosophy as well as a method, and the procedure involves studying a small number of subjects through extensive and prolonged engagement to develop patterns and relationships of meaning. In this process, the researcher "brackets" his or her own experiences in order to understand those of the participants in the study."

### **2.3.g. Case Studies**

Case studies often combine emic (understanding) and etic (explanatory) perspectives.

The qualitative case study approach focuses on understanding the dynamics preserved in a management situation (Eisenhardt, 1989). Case study is an empirical method that seeks to investigate contemporary phenomena (Yin, 2009; Robson, 2002).

Creswell (2003, p. 17) defines the case study by stating that the “researcher explores in depth a program, an event, an activity, a process, or one or more individuals. The case(s) are bounded by time and activity, and the researchers collect detailed information using a variety of data collection procedures over a sustained period of time.”

According to Baxter and Jack (2008, p. 544), the qualitative case study “is an approach to research that facilitates exploration of a phenomenon within its context using a variety of data sources. Yin (2009) notes that a case study is an empirical inquiry that investigates a contemporary phenomenon within its real-life context.

The case may be a program, an event, or an activity bounded in time and place. Case study research examines a bounded system or a case over time and in detail, employing multiple sources of data found in the setting (McMillan and Schumacher, 2001).

Qualitative case study research is particularly effective for examining *why*, *how*, and *what* questions (of the question series *who*, *what*, *where*, *how*, *why*), inquiries addressing a contemporary phenomenon over which the researcher has little or no control.

The case study thus most often is employed in explanatory and exploratory research (Yin, 2003; Saunders, Lewis and Thornhill, 2007).

Case study methodology typically is guided by one of two key approaches, one proposed by Robert Stake (1995), the other by Robert Yin (2009).

Yin (2009) identifies at least six types of case studies based on a two-by-three matrix. Case study research, Yin posits, may involve a *single* case or *multiple* cases, and whether single or multiple, a case study may be *exploratory*, *descriptive*, or *explanatory*.

The present study was designed and conducted according to a qualitative case study approach. Further extensive and intensive discussion of case study methodology will be presented in Section 2.7 below.

The general characteristics of qualitative and quantitative paradigm assumptions are summarized in Figure H.



<b>View</b>	<b>Ontological assumptions</b>	<b>Epistemological assumptions</b>	<b>Axiological assumptions</b>	<b>Methodological assumptions</b>	<b>Rhetorical assumptions</b>	<b>Methodology</b>	<b>Methods</b>
Research paradigm	Nature of reality	Role of researcher	Role of values	Research process	Language of research	Strategies of inquiry	Techniques/ procedures
Quantitative (or deductional, positivistic, experimental, empirical)	Objective, separate from researcher  Single  Determinate	Researcher is independent of subject of research	Values are free and unbiased  Values are emotive and therefore outside of the scientific study	Deductive  Cause and effect  Free of context	Formal language based on a set of definitions  Impersonal voice	Experiments  Quasi-experiments  Surveys (longitudinal and cross-sectional)	Surveys  Experiments
Qualitative (or constructivist, inductive, interpretive, historical, postmodern, post-positivist)	Reality is subjective and multiple, as seen by participants in nature  Socially constructed and constantly changing	Researcher interacts with subject of research  Researcher is the primary agent for collecting and analyzing data  Researcher studies human experiences	Value-laden and biased  Values are personally relative, need to be understood; critique of ideologies will facilitate needed	Inductive process  Simultaneously, mutually shaping factors  Design emerges as study proceeds  Context-bound	Sometimes informal language  Evolving decisions  Personal voice	Ethnography  Grounded theory  Case study  Participatory action research  Phenomenology	Observations  Interviews: face-to-face interviews, telephone interviews, focus group interviews  Interviews involve unstructured and

		and situations, requires an instrument to capture complexity of the human experience  Researcher becomes immersed in social situation and relies on fieldwork methods	change	Self-questioning through research to think critically; flexive acts  Flexible, evolving, interactional, and developmental			open-ended questions  Documentation: documents provided by public documentation  Audio and visual materials  Delphi processes
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Methodological Assumptions								
Scientific method	Purpose	Focus	Sample/group study	Nature of observation	Type of data collected	Type of data analysis	Results	Final report
The researcher tests hypotheses and theory with data: “theory- test”	To test hypotheses, observe cause and effect; describe,	Narrow-angle lens; tests a specific hypothesis	Larger and randomly selected	Study behavior under controlled conditions;	Numbers and statistics	Identify statistical relationships	Generalizable findings that may be applied to other populations	Statistical report with correlations, comparisons of means, and

								statistical
Confirmatory, or top-down, scientific method	explain, and make predictions			isolated, causal effects				significance of findings
<p>Researcher generates new hypotheses and grounded theory from data during fieldwork: “theory-build”</p> <p>Exploratory, or bottom-up, scientific method, i.e. explore, discover, and construct</p>	<p>To understand and interpret a social interaction or phenomenon from participants’ perspective</p> <p>To critique and identify potential</p>	Wide-angle lens; examines the breadth and depth of phenomena	Smaller, non-random, and purposeful	Study behavior in a natural environment	Words, images, or objects	Identify patterns, features, or themes	Particular or specialized findings that are less generalizable	Narrative report with contextual description and direct quotations from research participants

**Figure E: Characteristics of qualitative and quantitative paradigm assumptions** (adapted from Creswell, 2003; Culbertson, 1981; Johnson and Christensen, 2008; Lichtman, 2006; Denscombe, 2007; Neuman, 2003; Vanderstroep and Johnson, 2009; Robson, 2002)

## **2.4. Mixed-Methods Approach**

The mixed-methods approach to research emerged in the mid- to late 1900s (Tashakori and Teddlie, 2003) as an extension of the traditional quantitative and qualitative approaches to research (Johnson and Onwuegbuzie, 2004). Its goal is to draw from the strengths and minimize the weaknesses of both the quantitative and the qualitative methodology (Johnson and Onwuegbuzie, 2004). With this approach to research, researchers incorporate within a single study methods of collecting or analyzing data from both qualitative and quantitative approaches (Creswell, 2003).

Creswell (2003, p. 21) defined the mixed methods approach as “one in which the researcher tends to base knowledge on pragmatic ground (e.g. consequence-oriented, problem-centered, and pluralistic). It employs strategies of inquiry that involve collecting data either simultaneously or sequentially to understand research problems. The data collection also involves gathering both numeric information (e.g. on instruments) as well as text information (e.g. on interviews), so that the final database represents both quantitative and qualitative information.”

According to Johnson and Onwuegbuzie (2004, p. 17), the mixed-methods approach is a “class of research where the researcher mixes or combines quantitative and qualitative research techniques, methods, approaches, concepts or language into a single study.”

Green, Caracelli and Graham (1989) highlight five major mixed methods approaches:

1. Triangulation;
2. Complementary;
3. Development;
4. Initiation;
5. Expansion.

Creswell (2003) describes six designs for use with the mixed-methods approach:

1. Sequential explanatory design;
2. Sequential exploratory design;
3. Sequential transformative design;

4. Concurrent triangulation design;
5. Concurrent nested design;
6. Concurrent transformative design.

### **2.5. Qualitative Case Study Approach: Definition of Case Study Research**

The case study approach is “a research strategy which focuses on understanding the dynamics present within a single setting” (Eisenhardt, 1985, p. 534).

Yin (2009) describes a case study as an empirical inquiry that investigates a contemporary phenomenon within its real-life context.

The case study approach to research is a tailor-made methodology for exploring new processes or behaviors (social phenomena), or others that are little understood (Meyer, 2001). The approach thus is particularly useful and effective for examining *why*, as well as *how* and *what*, questions concerning a contemporary set of events (social phenomena) over which the researcher has little or no control (Yin, 2009; Saunders, Lewis and Thornhill, 2007; Meyer, 2001). It allows the researcher to explore individuals, organizations, institutions, or processes (social phenomena) in a simple manner while observing complex interventions, relationships, communities, or programs (Yin, 2009), and “supports the deconstruction and the subsequent reconstruction of various phenomena” (Baxter and Jack, 2008, p. 544).

Different inquiry methodologies serve different purposes: a given inquiry methodology does not suit all ends. Robson (2002) identifies four types of purposes of inquiry: exploratory, descriptive, explanatory, and improving.

Case study methodology originally was used for exploratory purposes. However, it also is used for descriptive purposes if the generality of the phenomenon is of secondary importance. It also may be used for explanatory purposes (Höst, 2005).

The case study methodology is employed most often in explanatory and exploratory research (Saunders, Lewis and Thornhill, 2007). There in fact are many definitions of case study research in the literature, with a wide range of definitional components.

**Figure F describes the definitions of a case study as summarized by Christie et al. (2000):**

<b>Author/Definition</b>	Hakim , 1994	King , 1985	McKin- ney, 1966	Patton , 1990	Saunders , 1981	Smith , 1988	Stake , 1985	Yin, 1989
Holistic	X	X		X				
Absence of control						X		
Rare phenomena						X		
Sources of ideas						X		
Sources of hypotheses						X		
Situation of theory development						X		X
Future systematic research						X		X
Boundaries between phenomenon and context not clearly defined						X		X
Contemporary focus with a real-life context				X		X		X
<i>How</i> and <i>why</i> questions						X		X
Little control over events						X		X
Dependent on inductive reasoning					X			
Use of multiplicity of data				X	X			X
Specific					X			
Cannot be standardized					X			
Descriptive, qualitative, exploratory, and explanatory		X			X	X		X
Heuristic value					X			

Empirical inquiry								X
Multiple sources of evidence used								X
Embedded case studies as sub-units of analysis								X
Unit chosen is temporally and spatially bound			X					
Intensive examination of particular factors				X				
Particular historical development			X					
Unique configuration of being			X				X	
Bounded system							X	

Baxter and Jack (2008) suggest two key approaches that guide case study methodology: one proposed by Stake (1995) and another by Yin (2009). Both seek to ensure that the phenomenon being explored is investigated well and that its essence is revealed, but their methods and techniques differ considerably.

### **2.5.a. Case Study: Knowledge Claims and Strategy of Inquiry**

Stake (1995) and Yin (2009) base their case study approach on constructivist philosophy (Baxter and Jack, 2008), which assumes that truth is relative and depends on the perspective of the individual. Constructivism recognizes the importance of subjective human beings' creation of meaning, but does not outright reject the notion of objectivity (Crabtree and Miller, 1999). It is based on the premise of a social construction of reality (Shlasky and Alpert, 2007). A case study is a qualitative inquiry.

Klein and Myers (1999) describe three types of case studies, based on the research perspective: positivist, critical, and interpretive. A positivist case study “searches evidence for formal propositions, measures variables, tests hypotheses, and draws inferences from a sample to a stated population, i.e. is close to the natural science research model” (Höst, 2009, p. 135). A critical case study “aims at social critique and

at being emancipatory, i.e. identifying different forms of social, cultural, and political domination that may hinder human ability” (Höst, 2009, p. 135). Finally, an interpretive case study “tries to understand the situation or phenomenon through the participant’s understanding and interpretation of their context, which is similar to exploratory and descriptive types” (Höst, 2009, p.135).

Epistemologically, such an inquiry is a qualitative-interpretive case study, based on the constructivist paradigm (in ontology). The philosophical claims of the case study approach suit the present study well.

Following Yin (2009), the researcher has chosen to use the case study approach for four pragmatic reasons:

1. The focus of the study is to answer *what* and *how* questions. The three main research questions are: What is the legal status of Sulha in the Israeli criminal law? How can the Sulha be incorporated in the Israeli criminal law and what contribution would the Sulha make in this respect? What action is required for Sulha to be incorporated in Israeli criminal law?
2. The researcher cannot manipulate the behavior of the participants involved in the study.
3. The researcher wishes to include contextual conditions because he believes that these are relevant to the phenomenon with which the study is concerned.
4. The boundaries between the phenomenon and the context are not clearly defined.

The study sought to determine the legal status of Sulha in Israeli criminal law. The case could not be considered without the context, viz. Israeli criminal law, and more specifically, the *literal law* and *case law* pertaining to the criminal process. Further, the boundaries between the institution of Sulha and its context are not clearly defined. What is more, the phenomenon examined in the study is a singular and unique social phenomenon, and the study is the first in its field. The case study approach thus is well suited for the study.

### **2.5.b. Case Study Research Process**

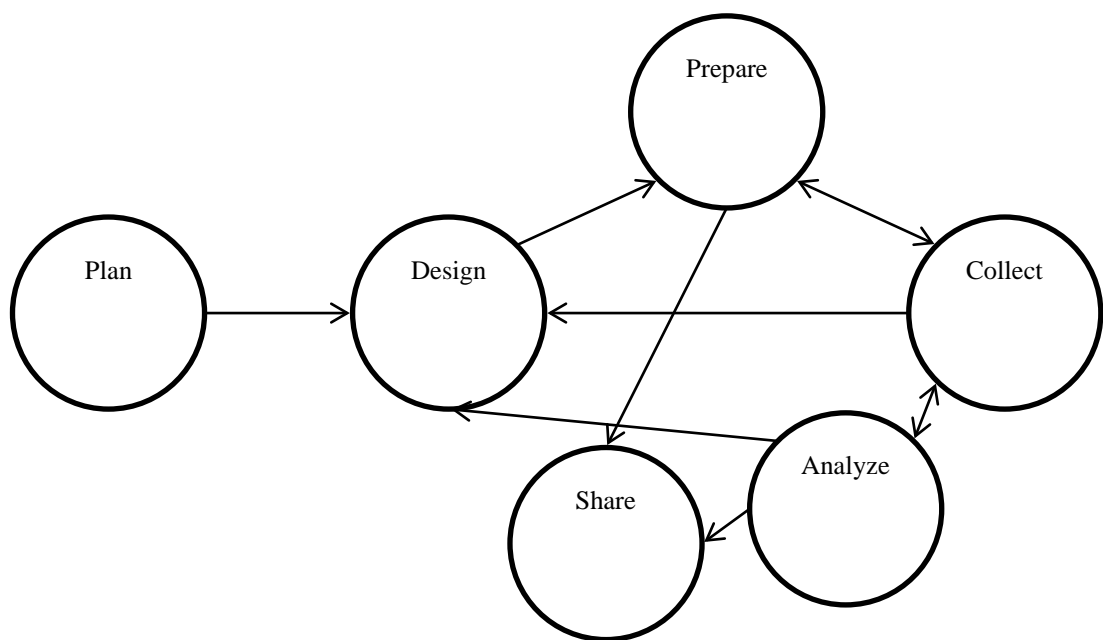
According to Höst (2009), an empirical case study should include five major processes:

1. Case study design: Objectives are defined and the case study is planned.



2. Preparation for data collection: Procedures and protocols for data collection are defined.
3. Collecting evidence: Data is collected concerning the case being studied.
4. Analysis of collected data.
5. Reporting.

Based on Yin's case study process (2009), research will be conducted in six crucial, linear, and interdependent stages: *plan*, *design*, *prepare*, *collect*, *analyze*, and *share*.



In truth, almost the same process pertains in any type of empirical study.

### 2.5.c. Case Study Design and Planning

Good planning is crucial for the success of a case study process. Several elements must be included in planning. Robson (2002) argues that the plan for a case study process should at minimum include the following components:

1. Objective: What is to be achieved?
2. The case: What is to be studied?
3. Theory: What is the frame of reference
4. Research questions: What is to be known?

5. Methods and procedures
6. Selection strategy: Where are data to be sought?

Yin (2009) identifies five components of a case study research design:

1. A study's questions;
2. Its propositions (also called *issues*; Stake, 1995), or hypotheses (Höst, 2009);
3. Its unit(s) of analysis;
4. The logic linking the data to the propositions;
5. The criteria for interpreting findings.

The design and plan may be formulated in the case protocol.

All five elements receive consideration in the present study. The main propositions of the study are:

1. Israeli criminal law does not recognize Sulha as an alternative conflict settlement process to the current Israeli criminal process.
2. Justice is not always achieved by the Israeli criminal process; most of the Israeli public lacks confidence in the Israeli criminal process; there is distortion of justice (erroneous rulings) in the Israeli criminal process; and the conviction rate in criminal cases is very high, with vanishingly few exonerations.
3. It would be possible to enhance the Israeli criminal process by, inter alia, incorporating the institution of Sulha within the criminal process; incorporation of Sulha in the Israeli criminal process would enhance the Israeli criminal process by achieving speedy justice and reducing the caseload at the courts; and incorporation of Sulha in the Israeli criminal process would boost public confidence in the criminal process and judicial activity, preclude, to the extent possible, distortion of justice in the criminal process, and achieve restorative justice, reconciliation, and installment of peace between the parties affected by the criminal act. Further, the Sulha process in Israel contributes greatly to reconciliation and installment of peace in Israeli society and achieves restorative justice, and the Israeli public accepts and is satisfied with it.

Although the case study approach is an inductive one, a preliminary view of the general constructs or categories and their relationships is required. Initial research questions that lie behind the proposed study should be followed, as well (Vos, Tsikriktsis and Frohlich, 2002). The research questions direct this study to a focus on the research topic, a review of the related literature, and specific methods of data collection and analysis.

The purposes of the study guide the selection of a particular type of case study design (Baxter and Jack, 2008), and the study describes and explores the case.

Yin (2009) and Stake (1995) employ different terms to describe the variety of case studies. Yin (2009) classifies case studies as exploratory, explanatory, or descriptive, while also differentiating between holistic case studies, single case studies, and multiple-case studies. Stake (1995) categorizes case studies as instrumental, intrinsic, or collective.

This qualitative-interpretive study was designed and conducted as an exploratory, descriptive, holistic single case study. The research used to *explore* the phenomenon in question, in which the intervention being evaluated has no clear, single set of outcomes, was considered. Further, it *describes* a phenomenon and the real-life context in which it occurred (Yin, 2009). The case study is holistic because the case is studied as a whole.

As this study is unique in its subject, viz. the legal status of Sulha in Israeli criminal law, the best means for understanding that subject is a single case study, an approach that is well suited to the study.

Miles and Huberman (1994, p. 25) define a case as a “phenomenon of some sort occurring in a bounded context. The case is, in effect, your unit of analysis.” In this study I describe and explore the legal status of the institution of Sulha in the Israeli criminal justice system. The boundaries of the case are formed by definition, context, time, and activity. Definitionally, the study analyzes the legal status of the phenomenon; in terms of context, activity, and time, the study analyzes both the letter of criminal law (legislative activity) and criminal case law (court activity of the past fifteen years, 1990–2014).

Finally, the case used does not replicate that of any other case study.

### **2.5.d. Case Study Protocol**

The case study protocol is a document that describes the procedures and general rules to be followed and is intended to guide the researcher in his conduct of the case study. The protocol is a continuously changing document that is updated when the plans or design of the case study is changed.

The case study protocol should contain a number of elements:

1. An overview (objectives, issues, auspices, and relevant source material) made available to any person who may desire additional information (including participants), with a rationale for the sites to be selected and propositions to be examined, as well as the theoretical relevance of the study
2. Field procedures that describe access to key organizations and participants, and a schedule of data collection activities
3. The case study questions that the interviewer must keep in mind, table shells for data arrays, and potential sources of evidence for answering each question
4. A guide for the report that describes its outline, narrative format, sources of information, and intended audience.

According to Höst (2009), there are several reasons for maintaining a current version of the protocol. First, it serves as a guide for conducting data collection and thus prevents the researcher from failing to collect data where collection is planned. Second, it makes the research concrete in the planning phase, which may help the researcher decide what data resources to use and what questions to ask. Third, other researchers and relevant individuals may review it to offer feedback regarding plans. Feedback offered by other researchers concerning the protocol may lower the risk of missing relevant data sources, interview questions, and so forth. Finally, the protocol may serve as a diary in which all conducted data collection and analysis are recorded along with decisions to alter course based on the flexible nature of the study. An up-to-date protocol is an important source of information in the reporting phase.

Over the course of the study, the researcher maintains a current version of the case study protocol.

## **2.6. Field of research**

The field of research is the Israeli criminal justice system, both substantive (penal code) and procedural (evidentiary and criminal procedure), including both statutory and common criminal law. Criminal justice is a branch of general law. The foremost aim of this study is to examine the relationship between the Israeli criminal justice system and the institution of Sulha. Secondly, the study proposes a legal model (draft law) to incorporate Sulha within the Israeli criminal justice system.

## **2.7. Research Methods: Qualitative Data Collection Methods**

According to Mills (2003, p. 4), “qualitative research uses narrative and descriptive approaches for data collection to understand the way things are and what they mean from the perspective of the research respondents.” It therefore “requires a data collection instrument that is sensitive to underlying meaning when gathering and interpreting them” (Mason, 2002, p. 3).

Patton (1990) and Yin (2009) note that a hallmark of case study research is the use of multiple data sources, a strategy that also enhances the reliability of data. Several different types of data sources may be used in a case study. Lethbridge, Sim, & Singer (2005) describe three levels of data collection techniques:

- First-degree: Direct methods in which the researcher comes into direct contact with the subjects and collects data in real time, e.g. interviews, focus groups, Delphi surveys, and observations (using a think-aloud protocol).
- Second-degree: Methods in which the researcher directly collects raw data without actually interacting with the subjects during data collection, e.g. by using software tools.
- Third-degree: Independent analysis of a work artifact where such already is available, sometimes using compiled data, e.g. documents that already have been analyzed.

In a case study, potential data (primary and secondary) sources may include but are not limited to interviews, documents, archival records, direct observations, participant observations, focus groups, Delphi surveys, and physical artifacts.

Although the opportunity to collect data from a range of sources is very attractive due to the rigor often associated with this approach, there are dangers, among them that collection of overwhelming quantities of data requires management and analysis of these data, so that the researcher may find himself lost in them (Baxter and Jack, 2008).

In the present study, the qualitative data collection methods used are structured interviews, a Delphi survey, documents, the professional experience of the researcher, and a personal diary.

The researcher is of the opinion that these methods of gathering data ensure collection of valid, reliable, accurate, appropriate, and authentic data needed to answer the research questions.

The methods described here are academic, scientific, admissible, and credible in a qualitative case study approach.

### **2.7.a. Structured Interview**

Interviews are one of the most common qualitative research methods (Ary, Jacobs and Razavieh, 2002; Mason, 2002; Merriam, 1998). Kvale (1996) regards interviews as an interchange of views between the interviewer and interviewee on a topic of mutual interest. Cohen, Manion, and Marrison (2000, p. 267) argue that “the interview is not simply concerned with collecting data about life: it is part of life itself, its human embeddedness is inescapable.”

The interview generates much data that may be used to provide insight into the experiences of the respondent.

There are many types of interviews, among them structured interviews, semi-structured interviews, unstructured interviews, and non-directive interviews (Kajornboon, 2005).

Structured interviews were used in this study. The open-ended questionnaire employed consists of twenty-three questions (see **Appendix A**).

Structured (or standardized) interviews are “interviews in which all respondents are asked the same questions with the same wording and in the same sequence” (Corbetta, 2003, p. 209).

Among the advantages of structured interviews is that the researcher has control over the topics and the format of the interview, due to use of a detailed interview guide.

There thus is a common format, which facilitates analysis, coding, and comparison of data (Kajornboon, 2005).

Another strength of structured interviews, stressed by David and Sutton (2004, p. 160), is that “prompting can be included with the questions and if a question is inappropriate, data on why no response was made can be recorded.”

Also notable is that non-verbal cues, such as facial expressions and gestures, may be recorded.

Conversely, adhering too closely to the interview guide may be the cause of a failure to probe for relevant data. What is more, interviewees may hear and interpret, or understand, the questions in different ways.

#### **2.7.a.1. Guid for Structured Interview**

The researcher’s verbal comments and non-verbal cues may cause bias and affect interviewees’ answers (David and Sutton, 2004). Corbetta (2003) points out that this type of interview introduces some rigidity to the interaction.

#### **2.7.a.2. The Interviewees**

The researcher chose the interviewees very carefully. They were credible, trustworthy professionals who were experts in their respective field and together represented the three branches of government: the legislature, the executive and the judiciary. Among the interviewees were various public figures involved with criminal Sulha processes, notably criminal attorneys.

**Interviewee R1** was a retired senior Israel Police officer with many years of experience in investigations and prosecution. Most recently he was the claims office coordinator for a National District. Previously he was a police prosecutor and appeared in the courts over the course of many years.

**Interviewee R2** was a retired senior Israel Police officer who served for many years as an investigator and police prosecutor. His last position was acting director of the claims office in a National District.

**Interviewee R3** was a famous media personality and public figure. He practiced law independently for over twenty years and appeared frequently in court as a representative

of suspects and defendants. He also served for seven years as Court Registrar of Northern District.

**Interviewee R4** was a retired senior Israel Police officer. During his tenure, he served as an investigator and investigations officer. In his most recent position, he was the commander of a number of police stations in the Northern District.

**Interviewee 5** was a former member of the Knesset who served for two terms. He also served as a senior advisor to the Minister of Minority Affairs, the Minister of the Interior, and the Prime Minister.

**Interviewee 6** was an attorney by profession who had appeared in the Israeli courts for many years as a representative of suspects and defendants. He has specialized in one of the state courts and handled mainly criminal cases.

**Interviewee 7** was an attorney by profession who had specialized in one of the state courts. She was an independent attorney and represented clients in court on behalf of the Legal Aid Bureau.

**Interviewee 8** was a retired senior Israel Police officer. During his tenure as an officer, he served as a terrorist activity investigator, investigative team leader, and investigating officer. He also served as commander of several police stations.

**Interviewee 9** was a highly respected public figure. Over the course of his lifetime he has served in a variety of very prominent public offices: chairman of a local council, a member of the Knesset for fourteen years, deputy speaker of the Knesset, chairman of a number of Knesset committees, deputy minister, and finally Minister of Minority Affairs in the Government of Israel. He also served for many years as a member and as chairman of a Sulha Council.

**Interviewee 10** was a retired judge who served as magistrate court vice president in the northern district. He served as a judge in the magistrate court for seventeen years. Previously he had been a prosecutor for the Israeli Police for ten years. He also served as chairman of the Parole Board for more than fifteen years.

**Interviewee 11** was a highly respected public figure. Over the course of his lifetime he has served in a number of very senior public offices: a senior officer in the Israel Defense Forces, a member of the Knesset, an advisor to the prime minister; a diplomatic



consul, and a member of Israeli peace negotiation delegations. He also has been a member and chairman of a Sulha council for several years.

**Interviewee 12** was an attorney by profession. She worked as a legal assistant in court in criminal cases, *inter alia*.

**Interviewee 13** was a senior, well known public figure. He has been a member of the local Sulha Council for twenty-five years and has been involved in settling many disputes.

**Interviewee 14** was a jurist who has worked for many years in the courts and in the Office of the General Counsel in the West Bank.

**Interviewee 15** was an attorney and a retired very senior Israel Police officer. During his tenure with the police, he served in a number of positions: investigator, prosecutor, head of investigations, and so forth. He appeared in court in criminal cases on a regular basis.

**Interviewee 16** is an attorney by profession. She served as a legal assistant in court and works with criminal cases. She also was a court mediator and a Ph.D. student at an Israeli university and was researching conflict resolution in Arab society. She is an expert on the Sulha process.

### **2.7.b. Delphi Panel**

The term *Delphi* is derived from the oracle of Delphi. The Delphi method was developed by Nicholas Rescher, Norman Dalkey, and Olaf Helmer in their work on Project RAND at the dawn of the Cold War (1950–1960), which was informed by the aim of forecasting the effect of technology on warfare (Rescher, 1998). The first applications of the Delphi method were in the field of science and technology forecasting. Later, the method was applied in other areas, particularly for public policy issues concerned with economic trends, health, business, education, and the like.

Generally speaking, the record of the Delphi method is mixed. In certain studies, research results were found to be poor. However, there are those who argue that improper *composition* of the method produces weak results, but there is no weakness in the method itself.

Another weakness of the Delphi method is that future development cannot always be predicted accurately by the consensus of a group of experts. First, lack of knowledge plays an important role. In the event that experts have been given inaccurate information, the Delphi process adds to and strengthens the reliance on their lack of knowledge. Second, unconventional thinking by an outside amateur sometimes is preferable to the opinion of an expert. Another key problem affecting the Delphi method is its inability to make complex forecasts involving multiple factors. The Delphi method is most successful in forecasts involving single-scale indicators.

Today, the Delphi method is universally accepted in many fields as an effective qualitative research method.

The guiding principle of the Delphi method is that predictions are made by a structured group of experts, and these predictions are more reliable than those made by other groups or individuals (Rowe and Wright, 2001).

Delphi method techniques include:

1. Face-to-face meetings (mini-Delphi);
2. Estimate–talk–estimate (ETE);
3. Online Delphi (web-based technique; Colton, 2004).

Most Delphi procedures are paper-based, though in the past some procedures were conducted on a mainframe computer or network (Turoff and Hiltz, 1995).

In the present study, the Delphi method was used as a principal method of gathering data. The Delphi method was an interactive and systematic forecasting method reliant on a panel of learned and independent experts. The Delphi process consisted of nine stages/activities: defining the subject of the study, selecting the experts, preparing and dissemination of questionnaire in the first round, analysis of responses, preparing and dissemination of questionnaire in the second round, analysis of responses, achieved consensus, summary of gathered information and the final report.

One of the key steps of the Delphi process was the selection of the experts for the study. Two main considerations were taken into account in the selection of experts: composition and balance. The selected experts have a mix of views, positions, value

judgments, specific knowledge and disciplines about the study and were willing to participate in the Delphi process.

Some of the selected experts I knew during my work as a judge and during my academic studies in Israel, others were selected with the help of friends (judges, members of J'aha and university lecturers) or with the assistance of some experts in the field of criminal justice and Sulha.

The panel was comprised of seven members, which ensured an efficient and effective process of establishing facts and arriving at correct conclusions while minimizing the incidence of errors (Brockhoff, 1975; Linstone and Turroff, 1975).

A seven-member (D1–D7) Delphi panel was convened. Following are descriptions of the Delphi panelists:

- D1. Chief clerk and Northern District court administrator emeritus. He served in this position for nearly thirty-seven years. He also served as an advisor to the director of courts in Israel. He was a member of the State Employees Disciplinary Court. Finally, he has for some time served as chairman of a Sulha council in the Western Galilee.
- D2. An attorney by training. He served as a police prosecutor for the Northern District over the course of some eighteen years. He is extremely well versed in the Israeli criminal process.
- D3. A social worker by profession. He holds a master's degree in social work and has served as a senior probation officer for adults in the Northern District for some eleven years. He appears at court, prepares probation reports on detainees and accused parties for the courts, and regularly appears in court in criminal proceedings.
- D4. The founder and director of the first Arab International Peace Center in the Galilee. He is very active in efforts to promote coexistence and peace in Israel. He is the preeminent expert on the Sulha process in Israel and has served as chairman of a Sulha council for decades. A distinguished man who commands the respect of society, he authored a book about Sulha and has been awarded many prizes in recognition of his work in settling conflicts, reconciliation, and instilling peace in society.

- D5. A distinguished public figure who commands the respect of society. He has served in a number of positions, including acting mayor of a city in the north, assistant to the defense minister, and member of a Sulha council. Presently he serves as chairman of a Sulha Council in the Northern District.
- D6. An attorney by profession. He earned a master's degree in law at a prestigious Israeli University and practiced law independently. He served as a justice on a magistrate court and subsequently as a district court judge, and was appointed vice president of the magistrate courts. He heard criminal cases throughout his thirty-one-year tenure as justice and vice president.
- D7. An attorney by training. He was the owner and director of a major Israeli law firm. He also has represented suspects and accused parties in court for decades. He was very active in the Israel Bar Association and served in that organization in a very senior capacity. He was an activist and a board member of several Israeli academic institutions, and has served as president of an academic college for the past eight years. He has been awarded prestigious prizes for his professional, public, and social efforts to boost Jewish–Arab relations in Israel. Finally, he serves as chairman of a Sulha Council in Israel.

The panel of experts, which was carefully selected, responds to a questionnaire (**Appendix B**) in two rounds. At the end of the first round, the researcher presents an anonymous summary of the experts' opinions, including the comments accompanying their answers. The experts then reconsider their opinions in light of the comments accompanying the answers of other panel members. During this process, the assumption is that there will be a reduction in questions and the panel will proceed in the direction of the correct answer. The process ends in accordance with preset criteria for its cessation: presentation of a consensus and consolidation of results. The result is one that is agreed upon by the members of the panel during the cessation stage of the process (Rowe and Wright, 1999).

In the present study, I used the TET technique. The procedure used for the technique was as follows:

1. Literature review: gathering background information in order to choose a panel of knowledgeable, experienced, and skilled experts to discuss the criminal process and the Sulha process.

2. Selection of the expert panel: establishing the criteria based on the literature review for choosing experts who have the ability, desire, and skills to participate in the panel. Their consent to participate in the panel was obtained.
3. Review of readability: the experts read the preliminary draft instrument and their comments were received.
4. Setting up of discussion forum: the tool used was the questionnaire constructed for the purpose.
5. Delphi round 1: responses to the first questionnaire presented to the experts; recording the experts' comments and votes; summarization of this stage by the researcher.
6. Delphi round 2: continuation of the discussion of how to incorporate Sulha in the criminal process; formulation of a first draft of a proposed law; and a vote. The researcher recorded the comments offered by the experts and summarized this stage.
7. Result: voted for the final draft law for incorporating Sulha in the criminal process. The result reflected the "reality construct of the group" (Scheele, 1975).

Data analysis: The researcher prepared the protocol, including comments (e.g. his impressions), and cross-referenced the information with other sources, such as the questionnaire, professional literature, and his personal knowledge. As noted above, the members of the panel were selected according to specific criteria, among them their expertise, experience, and skills in the area of inquiry, and their ability to contribute to the project. The panel included representatives of the judiciary, the prosecution, the defense, the Probation Service (social workers), and Sulha councils. This professional composition ensured the validity and reliability of the study (Scheele, 1975; Spencer-Cook, 1989).

The process ended with the formulation of a final draft law for incorporation of Sulha within criminal proceedings. The process lasted approximately twenty-five days. The experts found the process engaging and of interest, and it ensured good results (Turoff and Hilts, 1995). The panel members took an active and equal part in the process, and the researcher who directed the discussion was familiar with the field of the study.

The response rates of the express for paper-based Delphi method dissertations was 100%.

The Delphi process was anonymous, which ensured active participation by the experts and expression of autonomous and authentic views, without bias and without fear (Calton, 2002; Westbrook, 1997). The ETE technique ensured that the panel members did not adhere to their initial opinions and that the entire process proceeded on the right track, under the guidance of the researcher.

### **2.7.c. Documents**

Three types of legal documents are relevant for collection of qualitative data for the study: statutory criminal laws, criminal court decisions, and parole commission decisions. The first type of documentation is statutory criminal laws who are relevant to the study: Courts Law [Consolidated Version] 1984 (CL); Prisons Law 1971 (PO); Extradition Law 1954; Incarceration in Country of Convicted Party's Citizenship Law 1999; Crime Victims Rights Law 2001; Probation Service Ordinance 1969 (PSO); Restriction of Return of Sex Offenders to Area of Offense Law 2004; Family Violence Prevention Law 1991; Prevention of Threatening Harassment Law 2001; Prevention of Sexual Harassment Law 1998; Prevention of Terrorism Ordinance 1948; Juveniles Law (Judgment, Punishment, and Treatment) 1971 (JLJPT); Criminal Procedure Law 1992 (CPL); Criminal Procedure Law (Investigation of Suspects) 2002; Criminal Procedure Law (Enforcement Powers: Arrest) 1996 (CPLEPA); Criminal Procedure Law (Search on Suspect's Body) 1996; Criminal Procedure Ordinance (Search and Arrest) 1965; Dangerous Drugs Ordinance 1973; Search Authority in Emergency Law (Temporary Order) 1965; Authority during Emergency Law (Arrests) 1979; Public Defender Law 1995; Welfare Law (Procedure for Juvenile Matters, Mentally Ill, and Missings Persons) 1955; PL; Conditional Release from Prison Law 2001 (CRFPL); Basic Law: President of the State 1964 (BLPS); Criminal Registration and Rehabilitation Law 1981; Police Ordinance [New Version] 1971 (PO); and EO.

The second type of documentation is decisions by Israeli criminal courts, including magistrate courts, district courts, and the Supreme Court.

The third type of documentation is parole decisions, which generally are not published. Only expanded decisions are published.

The technique for collection of admissible and reliable data from documents was interpretation of the documents.

#### **2.7.d. Researcher's Professional Experience**

The researcher has deep professional experience with the subject here researched. The researcher was appointed a magistrate judge in the Northern District in 1997. He then served as vice president for a period of nine years and presently is a senior judge. He served as administrator of the magistrate courts and litigated in a wide array of cases, particularly in criminal affairs. He also is the chairman of the parole commission. He has issued thousands of decisions in the criminal courts. Prior to his appointment as a judge, the researcher worked for nine years as an independent attorney, representing many defendants in the courts in all proceedings (before the magistrate court, district court, and Supreme Court). He also was a member of a Sulha council that served the Arab community in Israel.

As a researcher I possessed broad, high-quality professional knowledge in the field of the study. This knowledge was reflective and reliable.

#### **2.7.e. Research Methods: Personal Diary**

An authentic personal diary was an additional source for the collection of qualitative data for the study.

### **2.8. Qualitative Data Analysis**

Analysis was a part of the research design. Data analysis is the “process of making sense and meaning from the data that constitute the findings of the study” (Merriam, 1998, p. 178).

Qualitative data analysis thus is a process of making the data more manageable by organizing it, breaking it into manageable units, organizing it into categories, interpreting and synthesizing it, and searching for patterns (Bodgan and Biklen, 2006).

A basic principle of qualitative research is that data collection and analysis take place in parallel with construction of a coherent interpretation of the data (Maxwell, 2009; McMillan and Schumacher, 2011). The researcher evaluates the data using an array of interpretations to “find any and all relationships that exist with reference to the research questions” (Dooly, 2002).

Prior to analysis, the researcher sets in place several data management procedures and tools to organize and stabilize the various types of data. Höst (2009, p.151) states that “the basic objective of the analysis is to derive conclusions from the data, keeping a clear chain of evidence. The chain of evidence means that a reader should be able to follow the derivation of results and conclusions from the collected data.” The ongoing data analysis process is the “heart of building theory from case studies” (Eisenhardt, 1989, p. 539).

Analysis of qualitative data must be done using systematic analysis techniques. Höst (2009) notes two components of analysis of qualitative data: *hypothesis-generating techniques*, whose purpose is to derive a hypothesis from data, and *hypothesis confirmation techniques*, whose purpose is to confirm that a hypothesis in fact is true.

Yin (2009) described five analytical techniques: pattern matching, linking data to propositions, explanation-building, time-series analysis, logic models, and cross-case synthesis.

Stak (1995) described two types of analysis: categorical aggregation and direct interpretation.

For case study research, Eisenhardt (1989) suggests three analytical strategies: selecting categories or dimensions, selecting pairs of cases and then listing the similarities between each pair, or sorting the data by data source.

Maxwell (2009, p. 236) argues that “strategies for qualitative analysis fall into three main groups: categorizing strategies (such as coding and thematic analysis), connecting strategies (such as narrative analysis and individual case study), and memos and displays.”

The main strategy used for categorizing in qualitative research is coding. The goal of coding is to “fracture” (Strauss, 1987, p. 29) the data and rearrange it in categories that facilitate comparison between items in the same category and between categories.

Maxwell (2005) suggests three types of categories: organizational, substantive, and theoretical. Categories allow for the classification of similar concepts, ideas, and themes (Jacob and Razavich, 2002).



According to Merriam (1998, p. 183), “categories should reflect the purpose of the research. In effect, categories are the answers to your questions.” Each category is designated with a word or phrase that describes the essence of the category. These then are the codes for the category.

The final goal of qualitative research is to make general statements about relationships among categories by bringing to light patterns in the data (McMillan and Schumacher, 2001).

Following are the stages of the means and processes by which qualitative data analysis is conducted (based on Creswell, 2005; Höst, 2009):

1. Organizing and preparing the various types of data (e.g. transcribing interviews, optically scanning materials, making copies of documents);
2. Reading through all of the data;
3. The coding process and considering some remarks that will provide detailed guidelines for the coding process;
4. Using the coding process to generate a description of the setting or people as well as categories or themes for analysis, and then using the coding to generate a few (five to seven) themes or categories for the study;
5. Developing the way the description and themes will be represented in the qualitative narrative, and using a narrative passage to convey the findings of the analysis;
6. Making an interpretation of or meaning from the data.

Analysis of the qualitative data in this case study was designed and conducted in accordance with two types of analysis: categorical aggregation and direct interpretation. The data analysis process was conducted according to the following design steps:

#### Step 1: Organizing and preparing data for analysis

Since written laws, or statutes, and judgments are publicized in the official publications of the state (the *Book of Laws and Judgments*) and the various legal websites, including that of the courts, Nevo and Takdin, it was necessary to copy this information from them. I have in my possession written copies of the official legal documents (laws and

judgments) of the Knesset and the courts of justice (magistrate, district, and Supreme Court) required for the study.

The interviewees and Delphi panel participants did not agree to a recording of the interviews and the Delphi protocols. The interviewees responded in writing to the questions posed to them during the interviews.

I made copies of the written answers and the Delphi protocols.

The data were arranged according to source.

Step 2: Reading through all data

I read all of the findings (data) a number of times and formed a general sense of the data (ideas, understandings, etc.). I wrote general comments on the findings.

Step 3: Coding process

The categories were coded by assignment of colors to the various categories. After thorough and in-depth reading, an effort was made to match the categories to the research framework and questions. No computer program was used to isolate categories.

Step 4: Generating a description of the case study: generation of the categories and the subjects comprising the main findings of the research.

Step 5: Development of how the description and themes are represented in the qualitative narrative by using a narrative passage to convey the findings of the analysis.

Step 6: Making an interpretation of or meaning for the data.

## **2.9. Verification**

All academic research, whether quantitative or qualitative, must have truth value, consistency, applicability, and neutrality in order to be considered worthwhile (Guba and Lincoln, 1981).

Guba and Lincoln (1981, 1989) note that while the criteria for ensuring rigor in the quantitative approach are internal validity, external validity, reliability, and objectivity, those used in the qualitative approach to ensure trustworthiness are credibility, transferability, dependability, and confirmability.

To ensure trustworthiness, the same scholars recommend the use of specific strategies, such as peer debriefing, negative cases, persistent observation and prolonged engagement, audit trails, and member checks. In addition, the researcher must be responsive, adaptable to changing circumstances, and holistic, as well as have processional immediacy, sensitivity, and the ability to clarify and summarize (Guba and Lincoln, 1981).

Morse et al. (2002), meanwhile, argue that reliability and validity remain appropriate for attaining rigor in qualitative research and that qualitative researchers should reclaim responsibility for reliability and validity by implementing both integral and self-correcting verification strategies during the conduct of the study itself. They also argue that “strategies for ensuring rigor must be built into the qualitative research process *per se*” (Morse et al., 2002, p. 9) and recommend the use of specific strategies to attain rigor, e.g. researcher responsiveness, methodological coherence, theoretical sampling and sampling adequacy, an active analytical stance, and saturation.

These strategies, when used appropriately, ensure the reliability and validity of the completed study.

The above scholars further noted that “in qualitative research, verification refers to the mechanisms used during the process of research to incrementally contribute to ensuring reliability and validity and, thus, the rigor of a study. These mechanisms are woven into every step of the inquiry to construct a solid product” (Morse et al., 2002, p. 9).

Creswell (2013) recommended the following specific strategies to ensure internal and external validity and reliability:

1. Triangulation of data;
2. Member checking;
3. Long-term and replicated observation at the research site;
4. Peer examination;
5. Participating modes of research;
6. Clarification of researcher bias;
7. Rich, thick, and detailed descriptions.

Further, three techniques must be employed to ensure reliability. First, the researcher must provide a detailed account of the focus of the study and the setting in which data were gathered. Second, triangulation, or multiple methods of data collection and analysis, should be used. Finally, data collection and analysis strategies must be reported in detail, so as to provide a clear and accurate picture of the methods used in the study.

Maxwell (2009) discusses two broad types of threats to the validity of qualitative studies: researcher bias and reactivity. *Bias* refers to ways in which data collection or analysis is distorted by the values, theories, or perceptions of the researcher.

Maxwell also suggests specific strategies for contending with these threats, such as intensive, long-term involvement; rich data; respondent validation; searching for discrepant evidence and negative cases; triangulation; quasi-statistics; and comparison (Maxwell, 2009).

According to Höser (2009, p. 153), validity “must be addressed during all previous phases of the case study.” He chooses a classification scheme, also used by Yin (2003), that distinguishes between four aspects of validity: construct validity, internal validity, external validity, and reliability (Höst, 2009). Construct validity reflects “to what extent the operational measures that are studied really represent what the researcher has in mind and what is investigated according to the research questions” (Höst, 2009, p. 153). Internal validity is of “concern when causal relations are examined” (Höst, 2009, p. 154). External validity is concerned with “to what extent it is possible to generalize the findings, and to what extent the findings are of interest to other people” (Höst, 2009, p. 154). Finally, reliability is concerned with “to what extent the data and the analysis are dependent on the specific research” (Höst, 2009, p. 154).

Merriam (1998) recommends six strategies to enhance internal validity in qualitative research: triangulation; member checks; long-term observation; peer examination; participatory or collaborative modes of research; and clarification of the biases, assumptions, worldview, and theoretical orientation of the researcher at the outset of the study.

This case study is iterative rather than linear. The researcher moved back and forth between design and implementation to ensure consistency among questions,

formulation, literature, recruitment, data collection strategies, and analysis. Data were systematically checked. Construct validity also was considered.

The researcher provided a detailed account of the focus of the study, his role, the information position and basis for selection, and the context from which data were gathered. The researcher's bias was considered and clarified.

Within the conduct of the study, verification strategies that ensure reliability and validity of data are activities such as ensuring methodology coherence, sampling sufficiency, data collection and analysis, thinking theoretically, and theory development (Morse et al., 2002).

The research questions were in keeping with the methods, which in turn suited the data and the analytical process. The sample too was appropriate. The participants were the best representatives of and had the best knowledge of the case researched. Sufficient data to account for all aspects of Sulha were obtained.

Saturating data ensures replication in categories; replication verifies and ensures comprehension and completeness.

Data collection and analysis took place simultaneously. Collecting and analyzing data concurrently forms mutual interaction "between what is known and what one needs to know" (Morse et al., 2002).

Triangulation was used during all phases of the study to improve and confirm its rigor and reliability. The varied research methods enabled the researcher to collect rich data: data that are detailed, varied enough, reliable, and credible, such that they provided a full and accurate picture of the study. This strategy also reduced the risk of bias.

Both the supporting data and the discrepant data were rigorously examined.

The research thinking was theoretical and involved macro–micro perspectives, constantly checking and rechecking, and construction of an accurate and solid foundation.

Theory development moved deliberately between the micro perspective on the data and the macro theoretical understanding.

The theory was the outcome of the research process, and a template for comparison and further development of the theory. It is well developed, informed, comprehensive, logical, and consistent.

Together, all of these verification strategies contribute to building reliability and validity, thus ensuring rigor and trustworthiness.

## **2.10. Ethical Considerations**

Ethics are considered to be concerned with beliefs regarding what is right and wrong, proper and improper, good and bad (McMillan and Schumacher, 2001). They are important and essential for qualitative research (Maxwell, 2009; Christians, 2000), and should be involved in “every aspect of research design” (Maxwell, 2009, p. 216).

Creswell (2013) noted that the researcher has an obligation to respect the rights, needs, values, and desires of the informants. The research must guarantee the participants’ privacy, confidentiality, dignity, rights, and anonymity.

The research and the researcher must strictly observe the law.

In the present study, a combined teleological–deontological system of ethics was adopted.

The researcher’s fundamental ethical principles are:

1. The study must do no damage, broadly defined, to any person.
2. Law and human rights must not be violated.
3. The study must serve the interests of all of society.

Following are descriptions of the ethical strategies and measures implemented in planning and conducting the present study:

- The researcher informed the participants of the purpose of the study, its nature, data collection methods, and what he hoped to achieve (Denzin and Lincoln, 2002; Ritchie and Lewis, 2003), as well as explained to them their typical role and obtained their informed consent in writing, in the format given in **Appendix C**. In addition, it was made clear to the participants that the study was solely for academic purposes and their participation was absolutely voluntary and anonymous. No

compensation of any kind was given to them for participating in the study (Ritchie and Lewis, 2003).

- The researcher strictly guaranteed that participants' participation in the study was safe and lawful and did not harm them or pose any risk to them (Ary et al., 2002).
- The processes of data collection, data analysis, establishing the facts, arriving at a conclusion, and building a theory were transparent, credible, reliable, and acceptable, with no bias whatsoever; and were strictly conducted with the benefit of cross-referencing information gathered from various sources. Collection of data was anonymous and confidential.
- The participants' right to privacy was maintained.
- The study strictly adheres to the law, including the Israel Code of Judicial Ethics. The results of the study are truthful and accurate, and present the work of the researcher.
- The results of the study include acknowledgements of others who contributed to the research.

The product of the study benefits the court system; the judicial system; judges; all of Israeli society, including the non-Jewish minority; the country, including the academic community; and other legal systems around the world. The results of the study serve justice, reinforce the rights of the victim of an offense, and help the offender re-integrate in society. Economically, the results of the study are such as to reduce the cost of crime and reinforce adherence to social norms in human society. They can make justice more efficient and effective for the offender, for the victim, and for all of society.

The proposed model optimally reflects the correct balance between the interests of the victim of the crime, those of the suspect or offender, and those of the general public.

## **2.11. Summary**

This chapter discussed the design and methodology of the study at hand. The knowledge claims, ontology, and epistemology (philosophical assumptions and methodology) were discussed thoroughly. The constructive-interpretive paradigm was identified and chosen as the framework of the study.

In addition, the research methodologies and design, including strategies, instruments, and methods of collecting and analyzing data, were presented.

The research design of the study is that of a qualitative single case study methodology. Multiple qualitative methods were chosen, including interviews, a Delphi process, documents, professional experience, and a personal diary. Two types of data analysis were chosen for the study: categorical aggregation and direct interpretation.

The strategies employed to ensure the reliability and rigor of the study were thoroughly described and discussed.

Finally, ethical considerations pertaining to the study design were discussed.



### **Chapter Three: Findings**

This chapter will present the qualitative data corresponding to the three research questions. The data will be presented according to the following order: first will be presented data describing the legal status of the Sulha in Israeli criminal law. Data on this subject will be drawn from three sources: official legal documents, viz. statutory laws, rulings, and parole commission decisions; the professional literature; and the researcher's professional experience.

Next will be presented the qualitative data corresponding to the second and third research questions. The sources of the data for the second and third research questions consist of interviews, a Delphi panel, the researcher's professional experience, and a personal diary.

#### **3.1. Statutory Laws**

The statutory laws governing Israeli criminal law do not recognize the Sulha as an alternative conflict settlement mechanism to the Israeli criminal procedure. The relevant statutory laws are BLPS, CRFPL, JLJPT, PL, CPL, CPLEPA, and CL.

##### **3.1.a . CL**

CL does not in any way acknowledge Sulha as alternative conflict settlement mechanisms to the legal process .It makes mention only of arbitration and mediation.

CL regulates mediation and arbitration processes in civil law from a normative perspective. Section 79(b) provides that:

“a court trying a civil case shall be authorized, with the consent of the parties to the case, to divert all or part of a matter pending before it to arbitration, as well as to establish, with their consent, the terms of arbitration .The parties to the case shall, subject to the approval of the court, appoint the arbitrator. If no arbitrator is appointed by the parties to the case, the court shall be authorized to appoint the arbitrator.” The arbitration proceeding is conducted in accordance with the provisions of the Arbitration Law—1968. Section 79(c) of CL similarly provides that a court trying a civil case shall be authorized, with the consent of the parties to the case, to divert the civil action to mediation .The role of the mediator is to assist the parties to the case in arriving at an

agreement resolving the conflict between them by means of a mediation process, through the conduct of open negotiations.

A court that diverts a matter pending before it to a mediation process defers legal proceedings. In the event that the parties to the case arrive at a mediated agreement, the court is authorized to approve the mediated agreement and grant it the force of a ruling. In the event that no mediated agreement is reached, the court resumes the proceeding pending before it.

CL thus recognizes arbitration and mediation as conflict settlement mechanisms in civil matters but does not in any way recognize the Sulha process.

### **3.1.b. CPLEPA**

CPLEPA is a law of central importance in Israeli criminal procedure law. It establishes the basic provisions governing holding individuals, detention, and release from detention. Section 66 of CPLEPA defines the term *holding* as restriction of a person's liberty to move about freely due to suspicion that an offense has been committed or in order to prevent commission of an offense, the restriction being limited ab initio in time and purpose, all as provided by Chapter III of CPLEPA.

The provisions of Chapter III of CPLEPA (sections 66–75) establish that a police officer or private person shall be authorized to hold a suspect, witness, or vehicle under certain conditions and for certain purposes.

Chapter II of CPLEPA regulates detention and release from detention. Section 4 of CPLEPA provides that detention shall be by order of a judge (here in after, *order of detention*) except where the law grants authority to detain in the absence of such an order.

Section 33 of CPLEPA authorizes a police officer, under certain conditions and for certain purposes as provided therein, to detain a person suspected of committing a detainable offense (one other than a contravention). The police officer is authorized to release the detainee if he becomes convinced that detention is unnecessary (CPLEPA, section 25(a)).

A police officer who detains a suspect without an order of detention shall bring him forthwith to the police station and deliver him to the appointed officer at the station

(CPLEPA, section 27). The appointed officer shall render a decision regarding a person's detention, continued detention, or release on bail, or the type and terms of such bail, only after first granting that person a reasonable opportunity to make himself heard, and only after cautioning him that he is not required to say anything likely to incriminate him and that anything he says will likely serve as evidence against him, as well as that his refusal to respond to questions is likely to strengthen the evidence against him (CPLEPA, section 28).

The appointed officer shall be authorized to release on bail a person suspected of committing an offense without bringing him before a judge (CPLEPA, section 42). The bail shall be a financial deposit or a personal guarantee by the suspect, whether alone or in conjunction with any sort of [other] guarantee, or a financial guarantee or deposit by guarantors, all as ordered by the appointed officer (CPLEPA, section 41). If the appointed officer decides to release [the suspect] on bail or to set bail, he shall establish the types and amount of bail in accordance with the following criteria :the nature of the offense, the information in possession of the prosecution, previous convictions of the suspect, his financial circumstances and ability to pay the bail required, [and] the likelihood that the suspect will be able to meet the terms of bail, and in establishing the terms of bail for a minor, the appointed officer shall take into consideration the particular needs pertaining to a minor (CPLEPA, sections 42 ,46).

Note well that release on bail is on condition that the suspect present himself for questioning whenever required to do so and not obstruct questioning and justice. The appointed officer is authorized, with the consent of the suspect, to condition release on bail on additional terms, as provided by section 42 of CPLEPA .To complete the picture, let us also note that the Minister of Public Security is authorized to issue an order granting a public officer, as defined in subsection 39(c) and (d) of CPLEPA, police powers to hold or detain a person without an order if he is convinced that "granting such power is essential to the discharge of his functions" (CL, section 39).

A suspect detained by the appointed officer shall be brought as soon as possible and within no more than 24 hours before a judge (CPLEPA, section 29). In exceptional circumstances, the appointed officer shall be authorized to delay bringing the detainee before a judge, for the purpose of conducting urgent interrogation activity, by a period not to exceed 48 hours from the commencement of detention (CPLEPA, section 30).

When a motion for detention of a person suspected of committing an offense is brought before a competent court, the judge shall be authorized, after considering the investigative material upon which the motion is predicated, to require, by means of a reasoned order in writing, the detention of such suspect or his release on bail or without bail, on terms that he finds to be appropriate (CPLEPA, section 12). A judge shall order detention of a suspect if he is convinced that it is reasonable to suspect that the suspect committed an offense other than a contravention and that there are lawful grounds for arrest and the purpose of such detention is not realizable by means of release on bail (CPLEPA, section 13). The judge ordering a suspect's release from detention on bail shall establish the type of bail, the amount of bail, and the terms of bail and their duration, while taking into consideration the nature of the offense ; the investigative material in possession of the prosecution; previous convictions of the suspect; the financial circumstances of the suspect and his ability to submit the bail demanded; the ability of the suspect to meet the terms of bail ; and, if the suspect is a minor, his particular needs as a minor (CPLEPA, section 45).

Similarly, section 21 of CPLEPA provides that in the event that an indictment is issued, the court before which the indictment was issued shall be authorized to order detention of the accused until the close of legal proceedings if, having heard the parties, he is convinced of the existence of preliminary evidence proving the accusation; the existence of lawful grounds for detention, i.e. that there is a reasonable basis for fear that the accused would endanger a person's security, public security, or state security; or the existence of a reasonable basis for fear that release of the accused from imprisonment would cause obstruction of justice or evasion of legal proceedings or a prison sentence to be served; or cause concealment of property, influence of witnesses, or compromise of evidence in another manner; or if the court ordered that bail be posted and bail was not posted to the satisfaction of the court; or if any of the terms of bail was breached; or if grounds exist for voiding the release on bail.

The court shall further issue an order of detention until the end of proceedings only if convinced that the purpose of such detention is not realizable by means of release on bail .Section 21(c) of CPLEPA further provides a list of offenses in which a statutory presumption applies that if any person is accused of committing any of them, it is presumed that a reasonable basis exists for fear that he endangers a person's security, public security, or state security, unless the accused proves otherwise.

Further, a detainee who has been released on bail or prosecutor entitled to file a motion before the court for reconsideration of the matter pertaining to the detention, release on bail, or breach of the terms of release on bail, including a decision upon reconsideration in the event that new testimony was discovered ,circumstances have changed, or a substantial time has passed since the decision was handed down .In the event that the guilty party has been made subject to supervision of a probation officer, the probation officer also shall be authorized to file a motion before the court to grant an order altering its decision(CPLEPA, section 52).

If an accused person is detained until the end of proceedings and is in detention on account of the same indictment for a cumulative period of nine months and his trial in the court of first instance has not concluded with a verdict, he shall be released from detention on bail or without bail (CPLEPA, section 61a). If an accused person who has been detained until the end of proceedings for a cumulative period of up to nine months on account of the same indictment is convicted and his sentence has not yet been imposed, the court that convicted him shall be authorized to order extension of his detention until such time as a verdict is rendered, if it finds that there are grounds for his detention. If no sentence is imposed within 90 days of the date of the said court order, the accused shall be released from detention (CPLEPA, section 61(c)).

Section 62 of CPLEPA authorizes a justice of the Supreme Court to order extension of the detention of an accused who has been detained until the end of proceedings on account of the same indictment, beyond the period established by section 61 of CPLEPA, for a period not to exceed 90 days, and again to order such from time to time, as well as to order release of the accused, on bail or without bail, in the event that the justice of the Supreme Court is convinced of the impossibility of concluding legal proceedings within the said period of 90 days, on account of the type of offense; the complexity of the case; or multiplicity of accused persons, witnesses, or counts. He shall be authorized to order extension of the detention for a period not to exceed 150 days, and again to order such from time to time, as well as to order release of the accused, on bail or without bail.

CPLEPA thus neither recognizes nor takes any account of the Sulha process with regard to detention of suspected and accused individuals.

### **3.1.c . CPL**

CPL similarly does not view Sulha as a conflict settlement mechanism. CPL consists of eight chapters: Chapter I: General Provisions; Chapter II: The Parties and Their Representation; Chapter III: Detention and Release of the Accused (voided, except section 26); Chapter IV: Pre-Trial Proceedings; Chapter V: Trial Proceedings; Chapter VI: Appeal; Chapter VII: Special Legal Procedures for Finable Offenses; and Chapter VIII: Miscellaneous Provisions.

Section 11 of CPL provides that the State shall be the prosecutor in criminal law and shall be represented by a prosecutor, who shall conduct the prosecution. Pre-trial proceedings in criminal matters consist of a complaint, investigation, and prosecution. Every person shall be entitled to file a complaint with the police regarding commission of an offense (CPL, section 58). In the event that commission of an offense becomes known to the police, it shall commence an investigation .In the case of a non-felony offense, a police officer of at least the rank of chief inspector shall be authorized to order that an investigation not be conducted if he is of the view that the public has no interest in such or if another authority is authorized by law to investigate the offense (CPL, section 59). With regard to sexual offenses or violence against a present partner, a specific agreement pertaining to the decision not to conduct an investigation (CPL, section 59a). Following the end of the investigation, the investigative material shall be provided to an attorney or to a police prosecutor, all in accordance with the type of offense as provided by section 60 of CPL .In the event that a prosecutor to whom investigative material has been provided sees that the evidence is sufficient to indict a given person, he shall put him to trial, unless he is of the view that the public has no interest in a trial (CPL, section 62).

Sections 67a – 67i regulate closure of a criminal case by agreement. As a rule, a prosecutor, as defined in section 67a of CPL, is authorized to close an investigative case without issuing an indictment against a person suspected of an offense that is a contravention or an offense that is a misdemeanor or an offense that is a felony that is listed in the third annex to CPL, with the exception of certain offenses specified in section 67a(c) of CPL, contingent on the following two criteria: 1. The appropriate penalty for the suspect, in the view of the prosecutor, does not include actual imprisonment, and 2. The suspect has no criminal record from the five years preceding the commission of the offense to which the agreement pertains and there are no pending

investigative proceedings or criminal trials concerning the suspect on the part of the police or any other authority, as the case may be, that are not included in the agreement. The prosecutor shall not issue an indictment of the said suspect and shall close the investigative case if the suspect admits the facts detailed in a draft of the indictment and fulfills the terms of the agreement (CPL, section 67b). The prosecutor shall be authorized to include these terms among the terms of the agreement: 1. a payment to the State treasury in an amount not to exceed the amount established in section 61(a)(1) of CPL; 2. payment of damages to the victim of the offense in an amount not to exceed the amount established in section 61(a)(1) of CPL; 3. an undertaking by the suspect to refrain from commission of any offense for the duration of a period to be specified in the agreement and not to exceed one year; 4. completion of a program of treatment, correction, and rehabilitation to be specified by the officer, inclusive of performance of community service and such; 5. implementation of various measures to correct the damage caused by the offense, with the purpose of restoring the status quo ante and preventing commission of the offense with which the agreement is concerned, all for a period to be specified in the agreement and not to exceed one year (CPL, section 67c).

Let it be clear that before a prosecutor discusses the terms of an agreement with a suspect, he must prepare a draft indictment and, in a reasoned decision, indicate the circumstances in light of which the appropriate penalty for the suspect does not include actual imprisonment and fulfillment of the terms of the agreement will see to the public interest without his prosecution (CPL, section 67).

Following submission of an indictment, the prosecutor shall be authorized, at any time following commencement of the trial, to retract any count of those in the indictment, but he shall not do so if the accused has confessed (CPL, section 93).

Section 149 of CPL regulates preliminary claims that the accused is entitled to make following commencement of the trial, viz. absence of territorial jurisdiction; absence of material jurisdiction; a defect or fault in the indictment; that the facts in the indictment do not constitute an offense; a previous exoneration or a previous conviction for the act with which the indictment is concerned; another, pending criminal trial of the accused for the act with which the indictment is concerned; immunity; limitation; amnesty (Pardon); and that filing of the indictment or conduct of the criminal proceeding is in material contradiction to the principles of justice and fair trial (a claim of abuse of process).

If a preliminary claim is accepted, the court shall be authorized to emend the indictment or to void the count and, in the event of absence of jurisdiction, to transfer the matter to a competent court.

In a criminal trial, the court shall be authorized, at the commencement of the trial and according to the terms established in section 143a of CPL, to conduct a preliminary hearing on the indictment, with the consent of the prosecutor and the accused .On this matter, section 143a of CPL provides as follows:

**143a. Preliminary Hearing**

(a) In the present section—

**“Crime Victims Rights Law”**—Crime Victims Rights Law -2001;

**“The end of the hearing”**—including handing down of a ruling;

**“A severe sexual offense or violent offense”**—as defined in section 2 of the Crime Victims Rights Law.

(b) Notwithstanding the provisions of section 143, the court shall be authorized, at the commencement of the trial and subject to the provisions of subsection (c), to conduct a preliminary hearing on an indictment whose purpose is one of the following:

(1) Ascertaining the position of the accused as regards admission or denial of all or some of the facts alleged in the indictment;

(2) Examination of the possibility of minimizing the factual or legal dispute, in its entirety or in part;

(3) Rendering hearing of evidence superfluous;

(4) Concluding the hearing with the preliminary hearing.



(c) The court shall conduct a preliminary hearing in accordance with the present section only if all of the following conditions are fulfilled:

(1) The accused has received notice under section 95(b) concerning the possibility of conducting a preliminary hearing and the court understands that the accused has understood the nature of a preliminary hearing and expressed his consent to conduct thereof;

(2) The accused is represented by a defense counsel;

(3) The prosecutor has consented to the conduct of a preliminary hearing.

(d) In a preliminary hearing under the present section, the court shall be authorized, with the consent of the parties to the case, to consider the investigative material and the list of all material that has been collected or recorded by the investigating authority and pertaining to the count, as well as such material or such a list collected or recorded by the defense, Nothing in the present provision shall derogate from the principles of witness immunity or the principles of privileged evidence.

(e) If the hearing on the indictment does not come to a conclusion with a preliminary hearing under the present section, the court shall transfer the hearing on the indictment to another judge, who shall continue to deliberate upon it according to the provisions of articles (e)–(g) of the present chapter.

(f) A protocol of the preliminary hearing—

(1) Shall not be provided for consideration to the judge who will continue deliberating upon the indictment under the provisions of subsection (e);

(2) Shall serve as evidence in another legal proceeding, other than an appeal of a ruling handed down in the preliminary hearing, only with the consent of the parties.

(g) The court shall ascertain, in a preliminary hearing under the present section regarding the indictment for a severe sexual or violent offense, whether the provisions of the Crime Victims Rights Law with regard to the right of the victim of a severe sexual crime or violent offense to express a position concerning a plea agreement with the accused have been fulfilled.

(h) The provisions of the present section shall not apply to a hearing on any of the following:

(1) An offense that is within the competence of the district court sitting as a panel;

(2) Any of the offenses specified in the beginning of section 240(a).

It is note worthy that the preliminary hearing is, in practice, a mediation process for criminal matters. The CPL does not make any mention of the Sulha.

### **3.1.d. PL**

PL consists of three parts: an introductory part, consisting of three chapters. Part I General, consisting of six chapters and Part II Offenses, consisting of eight chapters.

The introductory part consists of basic provisions of penal law and provisions regarding the application of penal law according to the time when the offense was committed and the place in which it was committed. Part I: General consists of provisions regarding the definition of and responsibility for a criminal offense, definition of the derivative offenses, and limitations on criminal liability, various provisions regarding interpretation in criminal law, the bearing of doubt on criminal law, application of the provisions of the introductory part and the general part, definitions of terms in

connection with criminal offenses, means of punishment, and provisions for appropriating penal laws;

Part II: Offenses consists of various provisions that define the offenses with which PL is concerned, namely, offenses relating to national security, foreign relations, and official secrets. These offenses are considered to be against the political and social order, offenses against public order and justice, offenses involving bodily harm, offenses involving damage to property, offenses involving forgery of money and stamps, minor offenses and offenses of preparation and conspiracy.

On July 10, 2012, the Knesset passed Amendment 113 to PL (hereinafter, *Amendment 113*). Amendment 113 is concerned with granting judicial discretion in the imposition of punishment. The text of Amendment 113 is attached as **Appendix F**.

The purpose of Amendment 113 is to establish the principles and criteria to guide punishment, the weight they should be given, and the relationship between them, so that the court can set the appropriate penalty for the guilty party in the circumstances of the offense (PL, section 40a). The guiding principle of punishment is that of proportionality.

The court must set an appropriate scope of punishment in accordance with the principle of proportionality, and for this purpose it shall take into account the social value to which the commission of the crime did violence, the degree of violence done to it, the accustomed penal policy, and the circumstances associated with the commission of the offense as specified in section 40i. Within the scope of punishment, the court shall hand down the appropriate punishment for the guilty party, taking into account circumstances unrelated to the commission of the offense as specified in section 40k. The court shall be authorized to deviate from the appropriate scope of punishment due to the consideration of rehabilitating the guilty party or protecting the public, under the provisions of sections 40d and 40e(PL, section 40c). The court shall be authorized to weigh the criteria of the personal deterrence of the guilty party and general deterrence, as well, provided that it does not deviate from the appropriate scope of punishment (PL, sections 40f and 40g).

Thus Amendment 113 to PL, which normatively regulates the construction of judicial discretion in punishment, contains no reference at all to the Sulha process and its significance in the penal process of the guilty party in Israeli penal law.

### 3.1.e . JLJPT

JLJPT consists of eight chapters. Chapter I consists of provisions concerning the general principles pertaining to minors and provisions defining terms. Chapter II consists of provisions concerning the establishment of a juvenile court and its competencies. Chapter III consists of provisions concerning examination of child witnesses and provisions concerning examination of witnesses who are minors, their detention, their release, and pre-trial proceedings against them. Chapter IV consists of provisions concerning legal procedure pertaining to prosecution of an accused minor. Chapter V consists of provisions concerning means of punishment and treatment of minors. Chapter VI consists of provisions concerning early release of a minor from a shelter. Chapter VII consists of provisions concerning follow-up treatment of a minor who is released from a reformatory and supervision of such by a probation officer, and, Chapter VIII consisting of other provisions.

On December 6, 2011, the Knesset passed the Youth Law (Judgment, Punishment, and Methods of Treatment) -2011 (here in after *Amendment 16*), which normatively regulates the alternative process to the general criminal process for minors and provides as follows:

#### 12(a) **Alternative Process**

(a) In the present section—

**"Alternative process"**—an alternative process to a criminal process or a part thereof that has been established in procedure; that is conducted other than before a court and whose purpose, inter alia, is to bring about an action that to express the minor's acceptance of responsibility for the criminal offense, including through correction vis-à-vis the victim of the offense, the community, or society;

**"Procedure"**—a procedure that has been established under the provisions of subsection (d).

(b) A probation officer who receives notice that it has been discovered in a criminal investigation that there is a basis for prosecuting a minor, as provided in section 12(a), shall consider whether to direct the minor to an alternative process in accordance with the threshold conditions specified in the procedure, and shall submit the results of his consideration to the competent officer; if the appointed officer finds that the minor may be diverted to an alternative process, he shall notify the probation officer, and the probation officer shall be authorized to divert the minor to such a process, to be conducted in accordance with the provisions of the procedure, provided that all of the following conditions are fulfilled:

(1) The minor consented in writing to participate in the alternative process, following his being informed by the probation officer of the requisite information concerning the nature of the process, including the significance of his consent to participate in the process and the anticipated ramifications of the process on his legal status, in language and in a manner that are comprehensible to him, considering his age and degree of maturity;

(2) The minor is cognizant of his involvement in the event attributed to him.

(c) At the conclusion of an alternative process, whether it has been completed in accordance with the provisions of the procedure or it has not been thus completed, the probation officer shall submit to the police his recommendation concerning the minor; completion of the alternative process shall constitute a central and decisive consideration in any decision regarding the continuation of the criminal process concerning the minor, and if he has not yet been put to trial, no decision shall be

made to prosecute him, unless doing so would be justified in view of special reasons, which shall be given in writing.

(d) The Minister of Public Security and the Minister of Welfare and Social Services shall, with the consent of the Minister of Justice, establish a procedure, to be published in Reshumot, regulating the types of alternative processes, which shall include, inter alia, provisions regarding the following:

- (1) The considerations and terms for diverting a minor to an alternative process;
- (2) The threshold conditions for conduct of the alternative process;
- (3) The status of the victim of the offense;
- (4) The confidentiality of anything said or submitted in the alternative process;
- (5) The outcome of completion or non-completion of the alternative process;
- (6) The body that shall be responsible for execution of the alternative process”.

Note well that as of today, the procedure regulating types of alternative processes under section 12a (3) of JLJPT has not yet been published.

Importantly, the purpose of Amendment 16 is to establish for minors an alternative process to the criminal process that is not conducted before a court (bill, Knesset, 5768, 247 (July 14, 2008) 400). The purposive interpretation of Amendment 16 shows that the legislator assumes that the criminal process does not always prove a solution appropriate for all of the actors involved with a criminal act, particularly the offender and the victim of the offense. The restorative justice model can provide a substitute for a legal process for the purposes of child offenders. Amendment 16 is intended to assist a child offender by establishing a process of a rehabilitative character, attempting to avoid a criminal process in appropriate cases.

### **3.1.f . CRFPL**

CRFPL consists of seven chapters: Chapter I, consisting of provisions for interpretation and definitions of terms; Chapter II, consisting of provisions concerning conditional release of a prisoner who has served two thirds of his prison sentence; Chapter III, consisting of provisions concerning voidance of a decision regarding conditional release; Chapter IV, consisting of provisions concerning appeals against parole commissions and special parole commissions; Chapter V, consisting of provisions concerning commutation of sentences of life imprisonment and mitigation of punishment by the President of the State; Chapter VI, consisting of provisions concerning parole commissions and special parole commissions; and Chapter VII, consisting of miscellaneous provisions and legislative amendments. For our purposes, the provision of section 9 of CRFPL that regulates the criteria considered by a commission in deciding whether a prisoner is fit for conditional release is a central provision. It establishes that:

#### **9. Considerations of the Commission**

In deciding whether a prisoner is fit for conditional release, the commission shall weigh the anticipated danger to the public welfare posed by release of the prisoner, including that to his family, to the victim of the offense, and to state security; the probability of the rehabilitation of the prisoner; and his behavior while in prison. For this purpose, the commission shall take into consideration, *inter alia*, the following information:

(1) The offense for which the prisoner is serving a prison sentence, including the circumstances of its commission, its type, its severity, its scope, and its consequences; the term of imprisonment to which he has been sentenced by the court; any fine or damages under section 77 of the Penal Law imposed upon him in such a sentence; whether he has paid them or has not; the reasons for such; and any mitigation of punishment, if such has been granted him by the President of the State;

(2) The content of the indictments pending against the prisoner; the types of offenses of which he is accused, the circumstances of their commission and their consequences according to the counts;

(3) Prior convictions of the prisoner, their number, their frequency, the type of offenses of which he has been convicted, their severity, the circumstances of their commission, their consequences, their scope, and the terms of imprisonment that he has served on their account;

(4) Previous commission hearings concerning the prisoner and decisions rendered at such, including any concerning avoidance of conditional release;

(5) Mitigations of punishment granted him by the President of the State for previous prison sentences to which he has been sentenced;

(6) The behavior, whether positive or negative, of the prisoner in prison during the course of his imprisonment, as specified following:

(a) Good behavior by the prisoner during the course of imprisonment;

(b) Display of a positive demeanor by the prisoner toward labor and measures taken for his rehabilitation;

(c) Use of a dangerous drug, as defined in the Dangerous Drugs Ordinance (new version) 5703/1973 (here in after, a dangerous drug);

(d) Detoxification from use of a dangerous drug;

(e) Any criminal offense committed by the prisoner and the type of offense;

(f) Behavior that is such as materially to injure other prisoners, prison officers, or concessionaire employees, as



defined in chapter III2 of the Prisons Ordinance (new version) 5732/1971 (in the present law, the Prisons Ordinance) or to disrupt the operation of the prison;

(g) Involvement in criminal activity, whether within the walls of the prison or outside of them;

(h) Untimely escape from prison or return thereto;

(7) An opinion regarding the prisoner given by the Prison Service, the Israel Police, or the defense authorities, and in the case of a prisoner in a privately administered prison as defined in chapter III2 of the Prisons Ordinance, the superintendent of the said prison and an inspector as understood in the said chapter, and in appropriate cases professional opinions, inter alia, regarding incest, domestic violence, and mental health;

(8) An opinion by the Prisoner Rehabilitation Authority, if such has been issued, concerning conditional release of the prisoner, as specified hereinafter, to which greater weight shall be given in proportion to how little of the prison sentence the child prisoner has completed:

(a) An opinion including a plan for rehabilitation of the prisoner, options for his integration at regular work or within a treatment program; the degree of supervision of the suggested program by the Prisoner Rehabilitation Authority also shall be taken into consideration for this purpose;

(b) An opinion according to which the prisoner requires no rehabilitation program and manifests no patterns of criminal behavior;

(c) An opinion according to which the prisoner is not fit for rehabilitation;

- (9) For a prisoner whose probation order under the Probation Ordinance requires him to remain under supervision by a probation officer following his release from imprisonment, an opinion by the Probation Service, if such has been issued, regarding conditional release of the prisoner;
- (10) The personal details of the prisoner, including his age and marital status.

The purposive interpretation of section 9 of CRFPL shows that it makes no explicit reference to the Sulha process and that a Sulha agreement does not constitute a criterion that the commission is to weigh in determining whether the prisoner is fit for conditional release.

### **3.1.g . BLPS**

BLPS normatively regulates, inter alia, the status of the President of Israel, as well as his place of residence, manner of selection, term of office, function and competencies, immunity, salary, resignation, and so forth. Significant for this study is the provision of section 11(b) of BLPS, which is concerned with the competence of the President of the State to grant amnesty to criminals and mitigate their punishment. It provides that:

“The President of the State—

- (a) .....
- (b) The President of the State shall be competent to grant amnesty to criminals and to mitigate punishments by their reduction or commutation”.

The legislator did not explicitly define the entire set of criteria—including, perhaps the consideration of Sulha—that the President of the State is to consider in deciding whether it is appropriate to grant amnesty to a criminal or to mitigate or commute his punishment.

### 3.2. Judicial Decisions/Judgments

For the purpose of this study, the researcher examined 590 cases in which Israeli criminal courts (the Supreme Court, district courts, and magistrate courts) handed down decisions during the years 1990–2014. A list of the cases is attached as **Appendix C**. Table 4 details the decisions handed down, which have been examined according to court type.

Court type	No. of cases	%
High Court (HC)	265	44.9%
District Court (DC)	187	31.7%
Magistrate Court (MC)	138	23.4%
Traffic Courts (TC)		
Youth Courts (YC)		
Total	590	100%

**Table 4: Number of cases heard according to court type.**

The qualitative data collected for this study thus reflect the Israeli criminal process in all of its stages and with reference to the various courts, as follows: detention prior to indictment; detention following indictment; reconsideration of a court decision concerning imprisonment, release on bail, or breach of the terms of release on bail; extension or renewal of imprisonment after a cumulative period of nine months during which the accused was in detention and no verdict was handed down; sentencing (punishment); and appeal, whether regarding a sentence, conditional release by a parole commission, or stay of execution. Table 5 displays the court decisions examined according to process type and court.

**Table 5: Cases examined according to process type and court type**

Process type/court type	Detention prior to indictment <b>CPL, SECTION 13</b>	Detention following indictment <b>CPL, SECTION 21</b>	Reconsideration of court decision regarding detention, release on bail <b>CPL, SECTION 52</b>	Extension of imprisonment beyond 9 months <b>CPL, SECTION 62</b>	Sentence, punishment <b>CPL, SECTION 193</b>	Sentencing appeal <b>CPL, SECTIONS 197–220</b>	Appeal for conditional release <b>CRFPL, SECTION 25</b>	Appeal for stay of execution <b>PL, SECTIONS 44, 87</b>	<b>TOTAL</b>
<b>HC</b>	---	80	15	21	---	131	---	18	265
<b>DC</b>	---	52	29	---	82	4	20	---	187
<b>MC/TC/YMC</b>	47	30	10	---	51	---	---	---	138
<b>TOTAL</b>	47 (8%)	162 (27.5%)	54 (9%)	21 (3.5%)	133 (23%)	13.5 (23%)	20 (3%)	18 (3%)	590 (100%)

Table 6 displays the various court decisions examined that make reference to the Sulha process.

Stance regarding Sulha/court type	The Sulha is not a relevant consideration in the criminal process	The Sulha is a relevant consideration in the criminal process	
<b>HC</b>	123	142	265
<b>DC</b>	42	145	187
<b>MC/TC/YC</b>	42	96	138
<b>TOTAL</b>	207 (35%)	383 (65%)	590 (100%)

**Table 6: The various court decisions examined that make reference to the Sulha process.**

It is evident from consideration of the court decisions examined here (Table 6, above) that Israeli courts do not recognize the Sulha as a *substitute* for the criminal process. The ruling handed down in CrimR 5686/93, *Baarani v. State of Israel*, TK-HC 1993 (3), 1458 stated:

“A Sulha was conducted between the families, and there can be no doubt that such a process, which instills peace between rival families and puts an end to a conflict between them without extended violence, is desirable and to be encouraged. Yet conversely, no quarter must be given to a feeling that with the conduct of a Sulha all is forgotten and forgiven and the need to continue with the usual criminal proceedings against those responsible for commission of offenses is significantly reduced. People who attempt to solve their problems and conflicts by resort to stabbings with a knife must know that a painful punishment lies in store for them for such actions and that conducting Sulha alone cannot exonerate them from this”.

A similar ruling was handed down in CrimA. 3052/10, *Zoabi v. State of Israel* (unpublished, September 5, 2011):

“Let me add that congratulations are in order on the occasion of the Sulha between the families that were parties to the quarrel and the resolution of the conflict between them.

Notwithstanding, this by no means extenuates the severity of the actions of the appellant in a way that would justify mitigation of the punishment imposed upon him. Although striving for conciliation of the families and instilling peace between them is a desirable deed, it does not render superfluous the criminal punishment of the offenders, as conciliation does not take the place of the reaction of the judicial system as representative of the public interest”.

In CrimC (Naz.) 145/09, *State of Israel v. Zoabi*, TK-DC 2010(4) 9089, it similarly was ruled that Sulha does not and must not void regular penal law. Similarly, in CrimC (Jer.) 306/98, *State of Israel v. Ibrahim*, TK-DC 1999 (3) 1426, it was ruled that:

“In my view, a true Sulha held between an offender and the victim of his actions has significance for sentencing. However, the weight to be given such a settlement must be balanced and correct, as it does not serve to void the need for punishment, and when appropriate, even deterrent, harsh punishment. Sulha does not take the place of punishment, and does not void the part of the public interest in imposing a punishment for the offense. At most, the fact of a *Sulha* suffices to bring about a certain mitigation of the punishment of the offender, as a means of facilitating peacemaking in general and domestic peace among the families in particular”.

A review of the case law shows that there are two principal approaches to the broad question of the legal status of Sulha in Israeli law. One approach, which champions the paradigm of formal, traditional criminal justice, refuses to grant Sulha any binding legal status in the criminal process. The second approach, which predominates among judges presiding over courts of all types, takes the view that Sulha can serve as a consideration in the favor of the guilty party, whether with regard to detention, punishment, or conditional release, but not as a *decisive consideration*, and certainly *not one that binds the court* at either the point of detention or that of sentencing (here in after, *the second approach*). Below we shall discuss the two approaches at length.

### **3.2.1. The approach that denies Sulha any legal status: the negative approach**

According to this approach, in detention law, when very severe offenses are alleged, Sulha does not negate the danger (ostensibly) posed by the offender to both public and personal security. For this reason, it is not to be assigned any weight whatsoever. Thus it is with offenses reflecting “the subculture of the knife and fist” (offenses involving murder, manslaughter, causing bodily harm under aggravating circumstances, causing

bodily harm with aggravating intent, attempted murder, unlawful possession of a knife, injury under aggravating circumstances, conspiracy to commit a felony, robbery under aggravating circumstances, abduction for purposes of extortion, sexual offenses against minors, etc.).

In CrimM 8449/07, *X v. State of Israel*, TK-HC 2007(4) 316, the court ruled that:

“I am not of the opinion that a Sulha agreement is of sufficient force to lessen the danger posed by the appellant. It is well-established that a Sulha agreement alone does not neutralize the danger posed”.

A similar ruling was given in CrimM 3680/10, *X v. State of Israel*, TK-HC 2010 (2) 2697, as follows:

“A Sulha agreement formalized between the families does not suffice to negate the danger posed by the appellant”.

In another case it was ruled that:

“I would clarify that I have attributed no significance to the Sulha agreement and to the intent of the complainants to void the complaints, as indicated by the Sulha agreement, as the complaints have been voided not because the complainants have retracted their claim of the truth of the versions of events that they submitted, but due to other reasons. Where severe offenses are concerned, the police are required to continue investigating and to bring the full force of the law to bear upon the offenders, even if the victim decides, out of his own considerations, to yield and/or to forgive the offenders who injured him”.

(ArrM 9251-12-12 (AK), *State of Israel v. Abu-Ahmad*, TK-MC 2012(4) 79845).

Thus Sulha, according to this approach, does not bring about a change in circumstances that can justify reconsideration of a decision concerning detention, let alone a consideration in favor of release on bail.

(CrimM 2876/03, *State of Israel v. Tarrif*, TK-HC 2003(2) 331; CrimM 2970/03, *State of Israel v. Nasseralden*, TK-HC 2003(2) 2; CrimM 9015/01, *State of Israel v. Alazazma*, TK-HC 2000(2) 115).

In ArrM 15850-07-12 (HA) *X v. State of Israel*, TK-DC 2013 (3) 1018, regarding this matter, the court ruled:

“As far as grounds for reconsideration are concerned, I have not found that new grounds have arisen since my decision of May 24, 2013. There has been, practically speaking, no change in the evidentiary basis before the court as regards the detention proceeding. I have considered the protocol of the main proceeding, as well. The fundamental picture has not changed. Even the fact that a Sulha agreement exists between the feuding factions of the family and the victims of the offense are interested in assisting the applicant, too, is not novel and was known to me even when the decision of September 13, 2012, was handed down. There I noted explicitly that “..., a Sulha held between the parties does not suffice to lessen the potential danger posed by the respondents. The apology to the family of the complainants and damages are but a necessary due the circumstances. Thus my impression is that this is not a Sulha agreement that can serve to restrain the respondents from aberrant behavior in future, but principally a Sulha agreement whose purpose is to anticipate the coming of a trial (and also, perhaps, of a judge). “For this reason I also did not see fit to permit the family of the victims of the offense to argue before me in the hearing of June 30, 2013”.

By the same token, at the stage of sentencing (punishment) for severe offenses committed under aggravating circumstances, with penal considerations including deterrence (both general and personal), recompense, prevention, and preservation of public security and peace, the personal circumstances of the guilty party and the consideration of his rehabilitation and correction are shunted aside and Sulha, in practice, has no weight. This rule has been applied in cases involving the following offenses: manslaughter, causing bodily harm with aggravating intent, forcible extortion, assault under aggravating circumstances and false imprisonment, injury under aggravating circumstances, causing bodily harm under aggravating circumstances, attempted murder, weapons offenses and injury under aggravating circumstances, manslaughter, causing bodily harm and injury under aggravating circumstances, conspiracy and attempted murder, attempted murder and causing bodily harm with aggravating intent, bigamy and weapons offenses.

In CrimA 865/09 *Hamad v. State of Israel*, TK-HC 2009(4) 3636, the court ruled emphatically that:

“The custom [of Sulha] has significance for the public and contributes not infrequently to maintaining order. Notwithstanding, the greater the injury to the other, the more



powerfully it will be understood that it is not the parties to the conflict who must establish the severity or slightness of the offense at hand”.

In CrimC (Naz.) 1068/07, *State of Israel v. Sabieh*, TK-DC 2009 (1), 16669, the court again emphasized that:

“The punishment of the guilty party shall be determined according to legislation and case law, and as a direct continuation of the danger posed to the general public by the violent behavior of the guilty party, and need not be influenced by the internal relations of the parties to the Sulha, it being prudent to recall that the assumption that the danger of a renewal of hostilities dissipates after such an agreement is reached does not always have a basis”.

What is more, according to this approach, Sulha is not among the considerations that the court weights in reaching a decision, whether regarding extension of the detention of an accused whose trial has not come to an end within a period of nine months, stay of execution, or conditional release.

Concerning extension of detention beyond nine months, it was ruled in CrimM 8105/12, *State of Israel v. Abu-Serhan*, TK-HC 2012 (4) 6569, that:

“In considering a motion for extension of detention beyond nine months, under section 62 of CPLEPA, we are called upon to strike a proportional balance between the right to liberty of an accused who has yet not been convicted and the interest of public security and protection of the soundness of the legal process from potential disruption, while taking into consideration a number of relevant criteria, among them: the passage of time since the detention of the accused; the rate of progress of the legal process concerning him; the degree of danger posed by the accused; fear of disruption of the criminal process; the severity of the offense alleged against the accused; its circumstances; and so forth....

In my view, the recommendation of the Probation Service with regard to accused no. 2 and the fact that a Sulha has been reached between the quarreling parties do not suffice ...to alter the determination regarding the danger posed by him, indicated by the severity of the counts against him and his past convictions”.

With regard to stay of execution, it was ruled that:

“Various claims are raised in the notice of appeal, referring to a report by the Probation Service and relying on the fact that a Sulha has been conducted. Indeed, at the conclusion of the report a recommendation is made of a penalty of imprisonment to be completed through various types of community service. I have considered the chances of the appeal, and I believe that the possibility that a penalty of imprisonment with community service will be imposed is not great. It further ought to be borne in mind that we are occupied only with an appeal concerning the severity of the penalty. Under the present circumstances, it is in order to apply the rule stating that one convicted in court must commence fulfilling the punishment with the imposition of the sentence or a short time thereafter. In sum, I have not found cause for stay of execution of the punishment until a ruling is handed down in the appeal”.

(CrimA 9896/09, *Mshara v. State of Israel*, TK-HC 2009(4) 10397)

In PrP (Cent) 50850-01-13, *X v. Parole Commission*, TK-DC 2013(1) 22103, regarding the effect of a Sulha on a decision concerning conditional release of a prisoner, it was ruled as follows:

“Consideration of the decision of the commission regarding the appeal ...suggests that it correctly attributed importance to the absence of a PRA [Prisoner Rehabilitation Authority] plan following early release of the appellant and correctly determined that the treatment plan by Mrs. Hekhal that had been presented to it and to us does not suffice to negate the danger posed by the appellant, as has been proven by the violent behavior that is the cause of his imprisonment, even if a Sulha has taken place between his family and that of the victim”.

Table 7 shows the distribution of decisions in the cases examined according to which the Sulha is not a relevant consideration to the criminal process, by offense type and court type.

**Table7: Distribution of decisions in which Sulha was not a relevant consideration in the criminal process, by offense type and court type**

<b>Offense type/court type</b>	Offenses relating to national security, foreign relations, and official secrets <b>PL, sections 91–132</b>	Offenses against the political and social order <b>PL, sections 133–235</b>	Offenses against public order and justice <b>PL, sections 236- 297</b>	Offenses involving bodily harm <b>PL, sections 298–382</b>	Offenses involving damage to property <b>PL, sections 383–460</b>	Offenses involving forgery of money and stamps <b>PL, sections 461–488</b>	Minor offenses <b>PL, sections 489–496</b>	Offenses of preparation and conspiracy <b>PL, sections 497–500</b>	Traffic offenses Traffic Ordinance 1964 (TO), Traffic Regulations 1964(TR)	
<b>HC</b>	---	54	7	122	25	---	---	14	1	223
<b>DC</b>	---	20	4	33	7	---	---	3	2	69
<b>MC/TC/YC</b>	---	18	6	30	9	---	---	3	7	73

<b>TOTAL</b>	---	92	17	185	41	---	---	20	10	365
		(25.2%)	(4.7%)	(50.7%)	(11.3%)	---	---	(5.4%)	(2.7%)	(100%)

Note: The number of offenses in the cases examined is greater than the number of decisions handed down because some cases involve multiple offenses.

### **3.2.2. The Second Approach, Recognizing Sulha as Having Legal Status: The Positivist Approach**

According to this approach, Sulha can serve as a consideration in favor of the guilty party, whether at the stage of detention or with regard to the appropriate punishment to impose upon an accused who is convicted in court, but is not a decisive consideration and certainly not one that is binding upon the court, whether in the detention process or in sentencing (CrimFH 3261/03, *Serhan v. State of Israel*, TK-HC 2003(1) 698). This rule has been applied at the point of detention in cases where the detainee was brought to court for various offenses, including causing harm under aggravating circumstances, assault occasioning actual bodily harm, extortion by threats, threats and harassment using a telecommunications device, causing bodily harm with aggravating intent, conspiracy to commit a felony and attempted robbery, extortion by threats, forcible extortion, false imprisonment, threats and causing bodily injury with aggravating intent, abduction of a minor for the purpose of causing bodily harm, extortion by violence, child abuse and causing bodily harm under aggravating circumstances, endangering human life in a travel lane, causing bodily harm under aggravating circumstances, assault under aggravating circumstances and willful damage, weapons offenses and attempt to cause aggravated bodily harm, causing bodily harm under aggravating circumstances, assaulting a minor under aggravating circumstances and causing actual bodily harm, extortion by threats and assault, causing bodily harm with aggravating intent, willful damage, an act of recklessness and negligence and obstruction of the course of justice, causing bodily harm with aggravating intent and common assault, causing bodily harm with aggravating intent and willful damage, assault occasioning actual bodily harm under aggravating circumstances, threats and subornation in connection with an investigation. However, in a case involving severe felonies and an accused who refuses to confess the criminal acts and thus does not regret them, it is difficult to see how Sulha could have significant weight.

In one of these cases, the State submitted a motion to detain a suspect prior to indictment for an offense of discharging a firearm in a residential area, under section 340a of PL. The court accepted the motion partially, ruling that:

“As for grounds of dangerousness, these have ceased to exist at this point due to the Sulha agreement, which it is to be assumed will be fulfilled”.

(ArrM 24699-12-09 (AK) *State of Israel v. Swaheed*, TK-MC 2009(4) 17178).

In another case, a court ruled on a motion to detain a suspect prior to indictment as follows:

“I am willing to give the blessing of the court to the Sulha process that is customary in such sector and place as it will be possible to do without need for involvement of the court, police, and so forth, but with the assistance of understanding and wise people this is preferable.” (ArrM 40716-09-11 (KS), *State of Israel v. Samara*, TK-MC 2011(3)60614).

As for detention following indictment, the following ruling was given in CrimM 590/08, *State of Israel v. Maresat*, TK-HC 2008(1) 878:

“Sulha can serve as a factor among the penal considerations of the court; it is rooted in the history of our region, and principally entails recruiting the dignitaries of a group to mediate between the quarreling parties of their group and restore the peace between them in exchange for monetary damages or assurance of dignity...We have all looked favorably upon the Sulha reached there, as such. Let me note here that this concept is inherently related to the idea of restorative justice that is gaining acceptance, cautious and circumspect though that acceptance may be. This institution also can be of significance in civil proceedings. ...Nevertheless, those engaged in working toward Sulha ought to be aware of the legal situation that pertains in both criminal and civil affairs, as well as that in civil cases and, all the more so, in criminal cases, Sulha does not constitute a substitute for the legal process. In the criminal sphere, once the system of enforcement has taken up the matter—though the prosecution and courts can take a Sulha agreement into consideration as a factor in favor of the accused—Sulha cannot take the place of a criminal trial. As for detention proceedings ...In a different context (CriM. 8041/06, *Marzouk v. State of Israel* (not reported)), Justice D. Cheshin noted that “Sulha agreements are to be given weight under certain conditions, even in detention proceedings”.

In another instance it was ruled that: “A Sulha is to be seen as one component piece of the broader picture even in detention proceedings (CrimM 414/14, *Abu-Gama v. State of Israel*, TK-HC 2014(1) 5366).

In CrimM (ZEF) 2559/03, *State of Israel v. Zahwa*, TK-MC 2003(4) 15397, the researcher, acting as judge, heard a motion to detain an accused until the end of proceedings for various offenses, including extortion by threats and threats. In accordance with the binding rule established by the Supreme Court, the researcher decided as follows:

“As is well-known, Sulha is a conflict settlement mechanism between the individual who committed the offense and the members of his family or tribe, and the victim of the offense and the members of his family or tribe, that is brought about by behavior that deviated from the customary ethical standard or the normative standard of criminal law. The process is an ancient one and has found a place among the non-Jewish minority in the state. Its purpose is to heal the injuries of the victim of the offense and the community that were caused by the offender, instilling peace between rival parties, and buttressing social solidarity. The healing of the injuries is expressed principally by satisfying the social and material needs of the victim of the offense; assuring the security, heritage, values, and wholeness of the community; and reintegrating the offender in the community.

In practice, in the Sulha process, the offender and his clan bear responsibility toward the victim of the offense, his clan, and the community. Accepting responsibility means, inter alia, that the offender recognizes the injury, expresses sincere regret for his actions, and is prepared to do everything possible to heal it as well as to prevent (or at least to reduce) any future injuries.

The act of healing, within the Sulha context, requires the offender to pay the victim of the offense monetary damages specified by the Sulha Council, a body that mediates/arbitrates between the rival parties and consists of a number of community dignitaries.

According to case law, Sulha can serve as a consideration in favor of the offender, both at the point of detention and with regard to punishment; it is not a decisive consideration; and it is by no means binding upon the court, whether at the point of detention or that of sentencing”.

Regarding sentences, the ruling in CrimA 4131/14, *Shumari v. State of Israel*, TK-HC 2014(1) 15953, states that:

“Existence of a Sulha agreement can constitute a consideration in sentencing, but cannot be considered a decisive consideration and cannot serve as a substitute for punishment under the law ...The Sulha agreement can constitute a consideration within the framework of a sentence, but its weight is such as to change in accordance with the circumstances of the offense. It has been ruled that the severity of the offense lessens the weight of the Sulha agreement ...”

As for reconsideration of a court decision in a matter involving detention, release, or breach of the terms of release on bail under section 52 of CPLEPA, it was determined in ArrM 62279-01-14 (NZ), *Nasser v. State of Israel*, TK-DC 2014(1) 42911, as follows:

“A Sulha agreement, such as is ultimately reached between the parties, is of great significance as an alternative mode of settling conflicts between individuals, and this should be welcomed ...

In my view, the existence of a Sulha agreement can serve as grounds for returning the appellants to their home only with the passing of a substantial period of time from the date of the conclusion of the agreement (at least 3 months), and even then, only after receiving the position of the victim of the offense ...regarding this potentiality”.

With regard to extension of detention beyond nine months under section 62 of CPLEPA, the Supreme Court has determined that the court must establish a proportional balance between the right to liberty that accrued to the guilty party prior to his conviction and the interest of public security and protection of the soundness of the legal process from potential disruption. Concurrently, a number of other relevant considerations must also be taken into account, including the passage of time since the detention of the accused; the rate of progress of the legal process concerning him; the degree of danger posed by the accused; fear of disruption of the criminal process; the severity of the offense alleged against the accused; its circumstances; and so forth (CrimM 7988/12, *State of Israel v. X* (not reported, November 11, 2012)).

In CrimM 6204/11, *State of Israel v. Hamoda*, TK-HC 2011(3)4091 and CrimM 7949/13, *State of Israel v. Elbaheri*, TK-HC 2013(4) 4509, the Supreme Court further ruled that:

“The Sulha has a socio-cultural status not to be ignored, but it is not decisive with regard to release [from detention when a period greater than nine months has elapsed”.



A district court sitting as an appellate court reviewing decisions of a parole commission under section 25 of RFIPL further determined that Sulha must figure among the various considerations that a parole commission takes into account in rendering a decision regarding conditional release of a prisoner.

In PP (MR) 56369-07-13, *GA v. Parole—Central District*, TK-DC 2013(3) 18517, the court ruled that:

“Like the parole commission, we do not ignore the Sulha agreements and those things said by the brothers of the appellant, the victim of the offense, before it”.

Table 5 shows the distribution of decisions in the examined cases according to which the Sulha process is a relevant consideration to the criminal process, by offense type and court type.

**Table 8: Distribution of cases in which Sulha was considered a relevant consideration to the criminal process, according to offense type and court type**

<b>Offense type/court type</b>	Offenses relating to national security, foreign relations, and official secrets <b>PL, sections 91–132</b>	Offenses against the political and social order <b>PL, sections 133–235</b>	Offenses against public order and justice <b>PL, sections 236–297</b>	Offenses involving bodily harm <b>PL, sections 298–382</b>	Offenses involving damage to property <b>PL, sections 383–460</b>	Offenses involving forgery of money and stamps <b>PL, sections 461–488</b>	Minor offenses <b>PL, sections 489–496</b>	Offenses of preparation and conspiracy <b>PL, sections 497–500</b>	Traffic offenses <b>TO and TR</b>	<b>TOTAL</b>
<b>HC</b>	---	48	13	136	26	---	---	17	3	243
<b>DC</b>	---	41	12	133	20	---	---	5	5	216
<b>MC/TC/YC</b>		36	5	80	5	---	---	---	5	131
<b>TOTAL</b>	---	125	30	349	51	---	---	22	13	590

		(21.6%)	(5.1%)	(59%)	(8.6%)			(3.7%)	(12%)	(100%)
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Note: The number of offenses in the cases examined is greater than the number of decisions handed down because some cases involve multiple offenses.

### 3.3. Parole Commission Decisions under Sections 3 and 9 of CRFPL

The researcher examined 76 cases concerning conditional release of a prisoner from imprisonment in which the parole commission made reference to Sulha. A list of these cases is attached as **Appendix D**. Parole commission decisions are published on the website of the court system, whose address is [www.court.gov.il](http://www.court.gov.il). Decisions are published anonymously, i.e. without the name of the prisoner and case number, the latter of which is the identification number of the prisoner. They are identified only according to hearing type, the date on which the decision is issued, the name of the commission chairperson, commission type, prison name, and district. Table 1.3.4 shows the decisions issued by the various parole commissions in the cases examined according to offense type and approach to Sulha, i.e. whether it is a relevant consideration with regard to release of a prisoner from imprisonment.

Distribution of decisions in which Sulha was not considered a relevant consideration to the criminal process, according to offense type and court type

**Table 9: Distribution of parole commission decisions referring to Sulha according to offense type and approach**

Note: Copy offense types from table on page 153.

Offense type										Is Sulha a relevant consideration for parole?	
No.	A	B	C	D	E	F	G	H	I	YES	NO
1				X							
2				X				X		X	
3		X		X						X	
4		X		X						X	
5		X		X						X	
6		X		X							X

Offense type										Is Sulha a relevant consideration for parole?	
No.	A	B	C	D	E	F	G	H	I	YES	NO
7				X							
8				X							X
9		X		X							
10				X							
11		X		X							
12				X							X
13				X							X
14		X		X	X						X
15				X							X
16					X						X
17				X							X
18				X						X	
19		X		X						X	
20		X		X						X	
21				X							X
22				X							X
23				X						X	
24				X					X	X	

[illegible]

Offense type										Is Sulha a relevant consideration for parole?	
No.	A	B	C	D	E	F	G	H	I	YES	NO
43				X							X
44				X							X
45		X		X						X	
46		X		X							X
47		X		X						X	
48				X						X	
49				X	X				X		X
50				X	X				X		X
51				X					X		X
52		X			X					X	
53				X						X	
54		X		X						X	
55		X			X					X	
56									X	X	
57		X			X					X	
58			X	X				X		X	
59		X									X
60				X					X	X	

Offense type										Is Sulha a relevant consideration for parole?	
No.	A	B	C	D	E	F	G	H	I	YES	NO
61		X		X							X
62				X						X	
63		X	X	X							X
64				X						X	
65		X		X						X	
66		X		X						X	
67		X									X
68		X		X						X	
69				X						X	
70				X							X
71				X							X
72				X				X			X
73				X						X	
74				X	X					X	
75				X						X	
76				X						X	

It is evident that parole commissions, too, manifest two approaches to Sulha. According to the *first*, Sulha is one of the various considerations that the commission is to take into



account in issuing a decision concerning conditional release of a prisoner from imprisonment. According to the *second*, Sulha is not a relevant consideration.

In the case of *X v. GA* (Damon Prison, Feb 26, 2013), the parole commission included Sulha among its considerations bearing on release of the prisoner and decided as follows:

“We have considered the report of the Probation Service issued at the time of his detention and learned from it that a Sulha was reached between the families concerned by the conflict due to which he was put to trial, and as of today the degree of the danger that disruptive behavior on the part of the prisoner will repeat has diminished. The prisoner is eligible for early release according to the criteria, and we therefore order early release as requested in the application”.

In a different case, the parole commission decided as follows:

“Before us is an application by the prisoner for early release from imprisonment of 1 year and 3 months to date. This is his third term of imprisonment for possession of a weapon and hindering a police officer ...The circumstances of the offense of which he was convicted and for which he was sentenced to imprisonment are an inseparable part of a bloody conflict ...between families. Thus we are pleased that a Sulha agreement has been submitted to us, based on which we have formed the opinion that there is a likelihood that this conflict will indeed be put to rest. A rehabilitation plan has been submitted to us.... [The prisoner] accepts responsibility and is ready to return to the embrace of his family. All the above indicate a likelihood that the danger he poses will lessen ...and we instruct that he be released conditionally ...” (*X v. GA* (Ayalon Prison, April 4, 2012)).

The parole commission in *X v. GA* (Ha-Sharon Prison, February 2, 2012) similarly decided:

“The prisoner is positive, lacks a criminal record, is without disciplinary offenses, and goes on leaves; a Sulha has been concluded between him and the complainant; he has a regular place of work that is willing to take him; and above all, there is a PRA rehabilitation plan—an appropriate plan for rehabilitation of the prisoner—as of January 11, 1992, and there is no doubt that it can nullify the danger he poses and rehabilitate

him. In light of the above, we are of the view that the prisoner is fit for early release and his release will do no harm to public security”.

Also of note is a decision made by the researcher in his capacity as chairman of a commission, based on the information and professional experience at his disposal and issued with the agreement of a majority of commission members:

“The prisoner is serving a prison sentence of 10 months to date pursuant to his conviction for offenses of causing severe bodily harm and injury under aggravating circumstances. Having considered the case of the prisoner and heard the arguments of the parties’ counsels, we are satisfied that the prisoner is fit for early release and his release poses no danger to the public peace. First, this is a first prison sentence. Second, the prisoner’s behavior during the period of his imprisonment was highly positive. Third, a Sulha was concluded between the prisoner and the victim of the offense. The Sulha agreement and the victim’s affidavit have been presented before us ...Fourth, we have before us a rehabilitation plan ...Fifth, it is our impression that the prisoner has internalized the severity of his deeds and moreover expresses sincere remorse. Consequently, we instruct that the prisoner be conditionally released from his imprisonment ...” (*X v. GA* (Hermon Prison, October 14, 2010)).

Conversely, in a different case, in which even the GA agreed to conditional release of the prisoner from imprisonment, although there was a Sulha and damages were paid to the family—an important circumstance—the parole commission decided not to release the prisoner conditionally from imprisonment, noting that “the commission must first and foremost take into consideration the offense for which the prisoner is serving a prison sentence, the circumstances of its commission, its type, its scope, its severity, and its outcomes (*X v. GA* (Ayalon Prison, April 24, 2012)).

### **3.4. Professional Literature Data**

Unfortunately, there is virtually no professional literature regarding the legal status of Sulha in the Israeli criminal process. What is available is to be found in two sources: one article by Shapiro (2006), and another by Hlahl (2002). Author Shapira also serves as a judge on the Haifa District Court. Shapira (2006, p. 458) argued that:

"The development of criminal law, granting status to the wishes of the victim of the offense, recognition of the importance of damages to the victim, and development of a

process for mediation between the offender and the victim of the offense in the institutional system of the Probation Service strengthen the justification for granting substantive recognition to Sulha among the considerations used to evaluate detention and punishment".

Hlahl argues that in the Israeli criminal process there are two opposing approaches to Sulha. In certain instances the courts "did not take account of the fact of the existence of the Sulha as a mitigating circumstance [in sentencing] or chose to ignore the Sulha" (Hlahl, 2002, p. 68). The second approach gives the Sulha binding legal status in the Israeli criminal process. The provisions of the Sulha were given great weight during the trial, from extension of the detention of the accused through the end of legal proceedings against him, as a consideration in favor of release from detention, and at the time of his sentencing in the main proceeding, as a mitigating consideration with respect to punishment (Hlahl, 2002). She proposes incorporating the Sulha process within the Israeli criminal process (Hlahl, 2002).

There also are no sources of information in the professional literature that proscribe implementing the institution of Sulha within the criminal process. To be sure, though, there is a school of thought that rejects the ADR paradigm in law in general and criminal law settlement in particular.

Fiss objects strongly to the models, techniques, and idea of ADR as an alternative mode of conflict settlement to a formal, traditional legal determination. Fiss (1981, p. 1075) states:

"I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised".

In the view of Fiss, settlement (hereinafter, *private consideration*) assumes, a priori, equality between the power of the parties and thus fails to contend with disparities in their respective power. Conversely, throughout the legal process, judgment seeks to use

legal tools to address the state of inequality between the respective power of the litigants. What is more, consent in private ordering often is consent that lacks authority. In most cases the conflict is not between individuals, but between organizations or groups. It is difficult under such circumstances to know whether consent that is given is in fact the authorized consent of the litigants. Moreover, the true purpose of a judicial determination is not to settle a conflict between litigants and instill peace between them, but to do justice, in the sense of enforcing the values and foundational principles of a legal system as represented by its customary documents (such as a constitution and laws), and to mediate between reality and these values and principles. These aims are not achieved by private ordering. Compromise is not equivalent to idealism and principles. There is no logical and practical way to sort cases into those appropriate for ADR processes and those appropriate to be heard by a court. Thus there is no possibility of a two-track model in which there are alternative avenues of judgment and private ordering. Fiss is of the view that even judgment of civil matters is not a private but a public matter.

With regard to conciliation/mediation in the criminal process, a few scholars—devotees of the retributive doctrine of punishment—have put forward a critique of the combination of conciliation/mediation between offender and victim in the criminal process (Brown, 1994; Levrant, et al. 1999; Ashworth, 1993).

In criminal affairs, according to this school, the conciliation/mediation process inherently does violence to the purpose of criminal law and its aims. One can discern six principal arguments against the conciliation/mediation process in criminal affairs, viz.:

1. Such a process does violence to the philosophical doctrine of punishment. At the foundation of this doctrine are the elements of public censure of the offense, general deterrence and prevention, and isolation of the offender from the public. These elements lack expression in a conciliation/mediation process.
2. A conciliation/mediation process in criminal affairs greatly compromises the fundamental principal of criminal justice that enforcement of criminal responsibility is within the ambit of the sovereign/state alone. The said process interchanges state and community without clearly defining the nature of this community, whether it exists, and how it finds expression in Sulha process. What is more, the democratic-liberal state is based on individualism: there is absolutely no place to speak of

communities. This process concentrates on the offender and victim while neglecting broader interests.

3. The conciliation/mediation process puts the emphasis on the victim of the offense that has been committed and the damages suffered, while neglecting conviction of the offender. It thus begets a disorderly admixture of property law and penal law. Further, in the case of some offenses (such as attempted offenses, conspiracy, and the like) no damage is done in actuality, but there still is potentiality for grave criminal responsibility.
4. The conciliation/mediation process fails to guarantee voluntary participation of the parties, and particularly that of the offender. The process thus does not result in an agreement that stems from free will.
5. The conciliation/mediation process does not effectively cope with the need to balance the power at the disposal of the parties (the offender and the victim), instead assuming equal power a priori.
6. The criminal process is principally characterized by two ideals: discovery of the truth and defense of the innocent. The criminal process is the Magna Carta of the accused. In a conciliation/mediation process, there is a danger that the procedural rights of the offender will be infringed.

This school's criticism of the incorporation of ADR in general, and of the Sulha process in particular in the Israeli criminal process, is not convincing.

There are three groups of philosophical theories concerning the purpose of punishment. (Gazal, 2002). The first group is the consequentialism theories, according to which the moral values of the action, including the punishment, should be determined only by the result of the action. The purpose of the punishment is to maximize the collective benefit to the offender, the victim and society. The relevant considerations for punishment are deterrence, prevention and rehabilitation (Bentham, 1931). The second group is the retributive theory. It argues that, regardless of the consequences of the punishment, there is a moral duty to impose on the offender a punishment commensurate with the severity of the offense he committed. The retribution is the sole consideration in determining the punishment (Kant, 1797; Rawls, 1955). The punishment must only be appropriate to the offense and its severity. The third group is the mixed theory. According to this theory, considerations of punishment should be based on elements

that involve, in one way or another, consequences and retribution. The retribution determines only the upper limit of the punishment, thus the court has room to adjust the punishment of the offender to be appropriately commensurate with the totality of the circumstances of the case, especially the individual circumstances of the offender. These degrees of freedom are granted the court with the aim of rehabilitating and reintegrating the offender into society. With regard to the rehabilitation of the offender, social rehabilitation is now accepted. It which takes place with the consent of the offender and the victim of the offense and the community (Gazal, 2002). Mixed theory is dominant in criminal law in Israel (PL, Chapter VI, article 1a).

Hence, the opposition to the incorporation of the Sulha in Israeli criminal law, based on the theory of retribution, is unacceptable in modern criminal law in general and in criminal law in Israel in particular. The study proposes the incorporation of Sulha in the Israeli criminal process. The Sulha will be part of the criminal process. The incorporation of the Sulha into the criminal process by the appended (Appendix F). The Sulha will be carried out during the criminal proceedings and under the supervision of the state authorities (the police, the prosecution and the court). The implementation of the Sulha process is conditional upon the **full and true consent** of all those affected by the crime: the offender, the victim and the community. The goal of the Sulha process is to maximize the aggregate benefit, both to the offender, to the victim and to the community. This goal fulfills the purpose of punishment in the Israeli criminal process. It is derived from the mixed theory on which the theory of punishment is based in Israel. The Sulha process focuses and concentrates, without discrimination, on the interests and rights of the offender, the victim of the offense and the community. The rights of the offender and those of the victim are well preserved, secured and not violated. The offender and the victim of the offense can receive legal representation by lawyers. In the case that any of them (offender or victim or both) cannot afford to pay for legal representation, he can obtain free legal representation by a public lawyer, all in accordance with the provisions of the Public Defender's Law -1995. The Sulha Agreement is subject to court approval. The Court is authorised not to approve the Sulha Agreement, if it is not lawful. The Sulha process according to this study is intended to solve a criminal dispute and is not part of civil law. The compensation paid to the victim under the Sulha agreement is **punitive damages** and not compensation for civil damages under tort law. Compensation is a form of punishment (PL, section 77). The Sulha agreement may include various penalties, other than punitive damages, such

as removing the offender from his place of residence, his obligation to integrate into the rehabilitation process, and so on.

### **3.5. Review of the Data**

Qualitative data from interviews conducted in connection with the relevant research questions (viz. the second and third) will be analyzed according to the following five categories:

- a. Justice and the Israeli criminal process.
- b. Public confidence in the Israeli criminal process.
- c. Miscarriage of justice (erroneous rulings) in the Israeli criminal process.
- d. Sulha and restorative justice.
- e. Sulha, reconciliation, and instilling peace between the parties affected by the criminal action.

#### **3.5.1 Justice and the Israeli Criminal Process**

Respondents were asked whether in practice justice is attained in the Israeli criminal process. The vast majority responded that in practice justice is not attained in the Israeli criminal process. Following are the respondents' principal answers to the question:

R1 "In Israel there is relative justice. At the same time, there are mistakes in Israeli criminal law." "The criminal process is supposed to achieve justice in society. Still, justice is not achieved in its entirety."

R2 "Justice is not always achieved."

R3 "I am not of the opinion that criminal process conducted in accordance with the provisions of the law promises justice."

R4 "There is relative justice. Not all offenses are investigated and solved and not all cases that reach the court come to the end they should."

R5 “In my view there is a great deal of dissatisfaction with all aspects of attention to the criminal process in the State of Israel. There is a difference in punishment of Jews and Arabs.”

R6 “There is no justice at all in the Israeli criminal process. The Israeli criminal justice system is a defective system. Some 99.6% of cases end with conviction.”

R7 “There is only the appearance of justice in the Israeli legal system. As for criminal cases, most end with conviction.”

R8 “Criminal law in Israel does not fully attain its purpose and thus justice is done only partially. The bulk of offenders and offenses do not reach court because the lack of discovering criminal offenses by the Israel Police.”

R9 “There is no justice and justice is not done in criminal law in Israel.”

R10 “The criminal process that holds sway in Israel does not generally achieve the desired goal, which is justice.”

R11 “There are almost no exonerations in criminal law. There is a heavy load on the court and police investigation system.”

R12 “The Israeli criminal process, at the end of the day, does not achieve justice.”

R13 “There is no justice in Israeli criminal law.”

R14 “There is relative justice, because those with means can hire the services of skilled, veteran attorneys who often succeed in tipping the scales in their favor—there is delay of justice.”

R15 “The criminal process is too long. There is a heavy load on the system.”

R16 Unfortunately, the way the criminal process is conducted today does not always result in a just trial.”

Further, the vast majority of respondents also reported that the bulk of the Israeli public believes that the Israeli criminal process does not achieve its goal, viz. justice:

R1 “The public thinks that justice is not entirely achieved.”

R2 “The prevalent view among the [Israeli] public is that justice is not always attained.”



R3 “The prevalent feeling is that the contribution of the criminal process to justice is by far less than expected by the public.”

R4 “There is criticism on the matter of punishment, which varies between the Jewish sector and the Arab sector. There is dissatisfaction with the criminal process.”

R5 “Most of the public does not believe that there is an objective process that gives the citizen the prospect of a real defense. The police and the [State] Attorney make plea bargains often, so that there are citizens who out of fear and lack of means of defense resign themselves to plea bargains so as to close the case.”

R6 “The Israeli criminal process does not contribute to justice by any means whatsoever. The public is afraid of the criminal process and there is no confidence in the criminal justice system. The system is perceived by the public as a combative, destructive system whose sole function is to end the process with a conviction.”

R7 “The public lacks confidence in the legal system in general and in the criminal process in particular. Judges are perceived as blatantly unjust and as defrauding the accused to their faces.”

R8 “Most of the Israeli public is not satisfied with the criminal process in Israel.”

R9 “The criminal process is perceived as only a penal system that in the majority of cases does not sufficiently deliver justice to the victim of the offense.”

R10 “There is a heavy feeling among the public of injustice in the Israeli criminal process.”

R11 “There is no doubt that the criminal process does not guarantee justice as the public would like to see.”

R12 “Israeli society and the [Israeli] public are not confident in the legal system today. The public feels that the criminal process is shielded and set.”

R13 “Most of the public thinks that there is no justice in Israel.”

R14 “The prevalent feeling among the public is that there is no justice in the criminal process in Israel.”

R15 “Citizens express the notion that ‘wealth pays.’”

R16 “The public thinks that the criminal process today does not contribute sufficiently to justice. There is a rise in crime rates, which causes a lack of confidence in the legal system.”

All of the respondents similarly reported that both they and the Israeli public think that the Israeli criminal process fails to provide quick (as opposed to delayed) justice:

R1 “There is no speedy justice in the criminal process.”

R2 “There is no speedy justice in the Israeli criminal process.”

R3 “There is a problem due to various reasons, such as bureaucracy, legal process, etc”. “The Israeli public has learned that the justice mill works very slowly.”

R4 “There is no speedy justice in the country”. “People are embittered by failure to deliver speedy justice in practice.”

R5 “Justice is delayed.” “There is pronounced dissatisfaction with the existing [Israeli] criminal process.”

R6 “There is not, very unfortunately, any basic justice in the criminal process.” “There is no speedy justice.”

R7 “The ambition of the criminal system is to maximize justice, but in practice this is not the case”. “The public thinks that the criminal process makes no contribution to society. There is no confidence in either the legal system or the criminal process.”

R8 “There is no speedy justice in Israel.”

R9 “Speedy justice is virtually nonexistent in the criminal process in Israel.” “The Israeli public does not believe that it obtains speedy justice from the Israeli criminal process.”

R10 “In most cases, what there is delayed justice”, “The criminal process in Israel is perceived by society as delayed justice.”

R11 “There is no speedy justice in the criminal process in Israel.” “The public, as it expresses itself, does not see speedy justice in the criminal process in Israel.”

R12 “Today, obtaining justice is not speedy.” “The public today feels a lack of security and the level of crime is only rising.”

R13 “Speedy, easily accessible justice is not to be found in Israel.” “The public, for the most part, does not think that there is speedy justice in society. The criminal process takes a long time due to the load on the court system.”

R14 “There is no speedy justice in the criminal process in Israel.” “It is possible to achieve speedy justice by changing the legal system.”

R15 “Justice in the Israeli legal system is not speedy.” “In the eyes of the public, there is no justice and the system is failing. There is stiff criticism of all the elements of the legal system.”

R16 “Justice is delayed in the [Israeli] court system”. “The overload at the courts and prolongation of proceedings cause a feeling of disdain for the court system [on the part of the Israeli public].”

Asked what might be done to improve the Israeli criminal process so as to deliver justice speedily, the vast majority of respondents answered that alternative processes, such as mediation and Sulha, should be incorporated in Israeli proceedings concerned with criminal matters. Some respondents answered that the courts’ load of cases should be reduced, judges should be appointed, professional plaintiffs and investigators should be put into service, and the criminal process should be shortened such that a verdict is issued a short time after commission of the offense. Some responded that the victim of an offense should be better integrated within the criminal process:

R1 “Shorten the criminal process. Incorporate alternative approaches to trial within the criminal process, such as mediation and Sulha.

R2 “Integrate alternative approaches to the criminal process, such as Sulha, mediation, conciliation.”

R3 “Appointment of suitable judges and improvement of the investigative process and work of the [State] Attorney.”

R4 “Reduce the load on the police and the courts and find alternative approaches to trial, such as Sulha and criminal mediation.”

R5 “Permit mediation and Sulha.”

R6 “Mediation and Sulha.”

- R7 “Criminal mediation.”
- R8 “Give binding legal status to the mediation and Sulha processes.”
- R9 “Prevent hearings from dragging on. Reduce the load at the courts and finding alternative approaches to trial, such as mediation and Sulha.”
- R10 “Easing the caseload of the courts and using alternative processes to trial such as criminal mediation and Sulha.”
- R11 “Improved performance of the police and [State] Attorney and incorporation of Sulha and mediation in the criminal process.”
- R12 “Reduction of the load at the courts”. “Conducting criminal mediation.”
- R13 “It’s necessary to reduce the load at the courts and recognize the institution of Sulha as a binding process in Israeli law.”
- R14 “Reduction of the load at the courts, incorporation of mediation and Sulha in the Israeli criminal process.”
- R15 “Appointment of more judges. Conducting criminal mediation and Sulha.”
- R16 “Examine alternative approaches to the criminal process, such as criminal mediation and Sulha”.

### **3.5.2. Public Confidence in the Israeli Criminal Process**

Regarding public confidence in the Israeli criminal process, most respondents answered that the Israeli public generally believes that public confidence in the criminal process is an important and crucial condition for sustaining a just legal system and criminal process in a democratic state, but in practice most of the Israeli public lacks confidence in the Israeli criminal process:

- R1 “Public confidence in the legal system and in judges is the guarantor of a sustained system of justice in a democratic state”. “Today it is a small percentage of the [Israeli] population that has confidence in the legal system and judges in Israel.”
- R2 “Public confidence in the Israeli criminal process and legal system is imperative, because in the absence of public confidence in the criminal process and legal system,

there cannot be justice in the criminal process". "The prevalent view today is that public confidence in the Israeli legal system is in severe decline."

R3 "There certainly is such confidence", "although there is no lack of grievances on the part of the public about the stages of the criminal process, prior to the beginning of trial."

R4 "Public confidence [in the Israeli criminal process] is very critical for the courts and for judges." "Confidence in the judiciary is relative and recently is in severe decline."

R5 "Public confidence [in the Israeli criminal process] is a central cornerstone of every proceeding." "The judges of Israel, because their load is so great, apparently do not manage, for the most part, to hear and examine the evidence. In almost 99% of cases, judges do not even sufficiently examine a plea bargain and [yet] grant it [their] imprimatur and consent. The judges send the parties to arrive at an agreement instead of conducting hearings and judging as ordered ...."

R6 "The prevalent view among the public is that the system is corrupt and unidirectional, and there is no confidence in the Israeli criminal process. There is no confidence in the judges and in the judiciary."

R7 "The Israeli public has no confidence in the Israeli criminal process."

R8 "The public is not at all satisfied with the Israeli criminal process."

R9 "Public confidence in the criminal process is decisive and critical to the criminal process". "The confidence of the Israeli public in the criminal process is undergoing deterioration."

R10 "In the eyes of Israeli society and the [Israeli] public, public confidence is critical for the conduct of a just trial." "We hear day in and day out that the Israeli public harbors criticism of the functioning of the courts in general and the judges in particular."

R11 "Public confidence in the legal system and the criminal process is of great importance." "Public confidence in the legal system is stronger than in other systems."

R12 “The moment the public believes in the criminal process, the offender and the public will respect the decisions of the courts, which will strengthen the legal system”. “The Israeli public has no confidence in the criminal process.”

R13 “Fundamentally, public confidence in the legal system is very important”. “Most of the [Israeli] public has no confidence in the legal system and the judges in Israel.”

R14 “Public confidence in the judiciary and the criminal process is progressively shrinking.”

R15 “In most cases, the [Israeli] public has no confidence in the legal system.”

R16 “The foundation of the judicial system in Israel lies in its independence and public confidence in it”. “Public confidence in the court system [in Israel] is progressively decreases in recent years; expression of the lack of confidence resounds in public feelings [in Israel] and public demand for change in the legal system.”

Respondents were asked what might be done in order to improve public confidence in the criminal process in Israel. All of the respondents answered that the Israeli criminal process should be rationalized and improved. According to the responses of the vast majority of respondents, rationalization and improvement of the criminal process would entail the following measures: shortening the criminal process; greater consideration of the rights of the victim of an offense; reduction of the courts’ caseload; and implementation of alternatives to criminal trial, such as mediation and *Sulha*:

R1 “Shorten the criminal process, and have restorative justice.”

R2 “Reduce the caseload of the courts, incorporation of alternative avenues in the criminal process, such as *Sulha* and mediation.”

R3 “Shortening the criminal process.”

R4 “Find alternative approaches to trial, such as *Sulha*.”

R5 “Incorporate *Sulha* in the criminal process.”

R6 “Incorporate mediation and *Sulha* in the criminal process.”

R7 “Incorporation of mediation and *Sulha* in the criminal process.”

R8 “Reduction of the caseload of the courts. Incorporation of mediation and Sulha in the Israeli criminal process.”

R9 “Shortening the criminal process and incorporation of alternative approaches to trial in the criminal process, such as Sulha.”

R10 “Reduction of the caseload of the courts and inclusion of the victim of the offense in the criminal process.”

R11 “Involving the victim of the offense in the criminal process, incorporation of mediation and Sulha in the Israeli criminal process.”

R12 “Incorporation of mediation in the Israeli criminal process.”

R13 “Shortening proceedings and incorporation of Sulha in the Israeli criminal process.”

R14 “Incorporation of mediation and Sulha in the Israeli criminal process.”

R15 “Incorporation of alternative modes in the Israeli criminal process.”

R16 “Reduce the caseload of the courts.”

### **3.5.3. Distortion of Justice (Erroneous Rulings) in the Israeli Criminal Process**

Respondents were asked whether there is distortion of justice (erroneous rulings) in the Israeli criminal process and what might be done in order to improve the Israeli criminal process so as to preclude distortion of justice. The vast majority of respondents answered that in the Israeli criminal process there are distortion of justice and erroneous rulings. The conviction rate in criminal cases is very high and there are vanishingly few exonerations. The vast majority of respondents thus stated that the Israeli criminal process must be rationalized and improved in several ways: safeguarding the rights of the parties to the process, including those of the victim of an offense; reduction of the caseload; and implementing alternative approaches to trial, such as mediation and Sulha:

R1 “There are erroneous rulings in every legal system, including Israel.” “The remedy for a criminal offense should be nuanced by incorporation of alternative approaches to criminal trial.”

R2 “In practice the guilty party is not always convicted and the innocent party is [not always] exonerated.” “The Israeli public thinks that the Israeli criminal process does not preclude distortion of justice.” “Sulha should be incorporated in the criminal process so as to allow the victim of the offense to take part in the criminal process.”

R3 “There can be errors and deviations that are not known to the court and cast a shadow of a doubt on the justice of the law in the eyes of the people.” “I do not subscribe to the view that all the verdicts in the criminal process are erroneous.”

R4 “Indeed, the criminal process suffers from distortion of justice.” “The Israeli public is not convinced that the Israeli criminal process guarantees accused parties the preclusion of distortion of justice.” “The caseload of the police and the courts should be lessened and alternative approaches to the criminal process, such as mediation and Sulha, should be incorporated.”

R5 “The Israeli criminal process is quite far from fulfilling the dictum that the guilty party is convicted and the innocent leaves exonerated.” “There are many people who have sat in prison and were convicted who feel that they have been wronged and subjected to injustice.” “There is distortion of justice in the Israeli criminal process, as well as erroneous rulings.” “In order to preclude distortion of justice, it is necessary to broaden the matter of appeals and to enable the parties to make their arguments heard in court, including in appeals court.”

R6 “There is no doubt that the Israeli criminal process is deficient.” “The Israeli criminal process suffers—to say the very least—from distortion of justice.” “The Israeli criminal process contributes greatly to distortion of justice.” “A legal revolution should be brought to the criminal process, encouraging more mediation and Sulha processes.”

R7 “In the Israeli criminal process there are not a few erroneous rulings.” “Not a few innocents have been convicted for a wrong they have not committed.” “The Israeli public thinks that the Israeli criminal process causes distortion of justice.”

“Judges should be trained and required to undergo continuing education programs.”

R8 “The Israeli public is not satisfied with the Israeli criminal process.” “Justice is almost never served.” “The Israeli criminal process does not guarantee that the guilty party will be convicted and the innocent party exonerated.” “There are erroneous rulings.” “The investigation process and investigators should be improved. The court



system should be improved, with incorporation of approaches other than criminal trial, such as mediation and Sulha, and an appropriate status given to the victim of the offense.”

R9 “I agree with the statement that the Israeli criminal process suffers from distortion of justice, because justice is not served in the courts.” “Israeli society does not accept the thesis that the criminal process contributes to doing justice; it contributes more to distortion of justice.” “The criminal process should be rationalized by shortening the proceedings, incorporating alternative modes in the criminal process, such as Sulha.”

R10 “The extremely high conviction rate casts a doubt on the dictum that the guilty party is convicted and the innocent exonerated.” “The criminal process suffers from distortion of justice.” “In order to improve the criminal process so as to preclude distortion of justice, the system should be improved and mediation and Sulha should be incorporated in the criminal process.”

R11 “There is no doubt that there are erroneous rulings in the Israeli criminal process.” “In order to improve the Israeli criminal process so as to preclude distortion of justice, the victim of the offense should be included in the criminal process and mediation and Sulha should be incorporated in the criminal process.”

R12 “There is distortion of justice in the Israeli criminal process.” “There is sluggishness and prolongation of proceedings; punishment is light and does not deter.” “In order to improve the Israeli criminal process so as to preclude distortion of justice, the victim of the offense should be given standing and models for settling conflicts outside of court, such as restorative justice, should be incorporated.”

R13 “In Israeli law, in practice, there is no justice in the criminal process in the sense that the guilty party is convicted and the innocent exonerated.” “There are distorted rulings in the Israeli criminal process.” “The Israeli criminal process does acts of injustice.” “Sulha must be incorporated in the Israeli criminal process.”

R14 “The Israeli criminal process does not always guarantee conviction of the guilty party and exoneration of the innocent.” “I agree with the statement that the Israeli criminal process suffers from distortion of justice.” “The Israeli public thinks that the

Israeli criminal process suffers from distortion of justice.” “Mediation and Sulha should be incorporated in the Israeli criminal process.”

R15 “The Israeli rate of exoneration is so low.” “The contribution of the Israeli criminal process to precluding distortion of justice is minimal, as perceived by Israeli society.” “The State does not faithfully represent, in practice, the victim of the offense.” “The victim of the offense should be offered an attentive ear; judges should be supervised and trained.”

R16 “If we examine the criminal process according to number of convictions versus exonerations, it is possible to say that there is no justice in the legal system in Israel.” There is a substantial increase in rates of conviction. “Exoneration in criminal law is becoming rarer and rarer”. “I agree with the statement that the Israeli criminal process suffers from distortion of justice”. “Changes should be made to the criminal process, such as giving expression to the position of the victim of the offense, speeding up proceedings and reduction of the caseload of the courts, safeguarding the fundamental constitutional rights of the parties to the offense.”

#### **3.5.4 Sulha and Restorative Justice**

With regard to Sulha and restorative justice, respondents were asked whether in their view and that of Israeli society and the Israeli public the Sulha process achieves restorative justice. An absolute majority of respondents answered that the Sulha process does achieve restorative justice. All respondents similarly stated that Israeli society and the Israeli public accept the Sulha process and are satisfied with it because it delivers restorative justice:

R1 “Sulha is a highly successful process for achieving restorative justice.” “Israeli society and the [Israeli] public look at the Sulha process quite positively and respect it.” “They think that it strengthens solidarity within society and instills peace.”

R2 “Sulha is restorative justice and achieves justice in society, solves the conflict between the parties involved with the offense, and engenders an atmosphere of peace between them.” “The Sulha process is indeed acceptable to Israeli society and the [Israeli] public, because it brings about restorative justice.”

R3 “The Sulha process indeed achieves restorative justice.” “The Israeli public tends toward making use of the Sulha process, because this process settles the conflict between those involved in it.”

R4 “The Sulha process achieves restorative justice in society, certainly.” “The Israeli public thinks that the Sulha process makes a great contribution to restorative justice and solves many conflicts fully, and even serves to bring people together in society.”

R5 “In my humble opinion and based on personal involvement in a great number of instances in which a Sulha was reached, I believe in this institution, and the Sulha agreement must receive status as a binding document; it puts an end to the conflict between the parties involved with the offense.” “The public is satisfied with the Sulha process and thinks that it achieves restorative justice.” “Many court rulings have given only a verdict, and as a result, due to dissatisfaction of one of the parties, this has deepened the conflict. Sulha brings the conflict to an end with consensus and in an effective, good manner.”

R6 “The Sulha process achieves restorative justice and solves the conflict.” “The Sulha process contributes greatly to restorative justice, and the public in Israel sees it as a vital, effective process that contributes much to restorative justice.”

R7 “Sulha makes a great contribution to restorative justice—Sulha solves the conflict between the accused and the victim of the offense. The Sulha process saves judicial time and rationalizes the Israeli criminal process. It prevents future conflicts,” “and this is the view of the Israeli public.”

R8 “The Sulha process solves the conflict from the root. It addresses the victim of the offense and the offender. The Sulha process brings people together and solves the conflict between the parties to the offense, and guarantees that the conflict will not recur.” “The parties to the offense (the victim of the offense and the offender) leave satisfied with the Sulha process.” “The Israeli public accepts and is satisfied with the Sulha process, and the Sulha agreement is acceptable to all of the parties.”

R9 “The Sulha process achieves restorative justice.” “Israeli society sees the Sulha process as a means of achieving restorative justice.”

R10 “Sulha brings about restorative justice.” “Israeli society and the [Israeli] public accept Sulha and think that it achieves restorative justice.”

R11 “Sulha causes the victim of the offense and the offender to come to an agreement in accordance with the procedure of the Sulha council, including satisfaction of their needs and those of society.” “The Israeli public thinks that the Sulha process achieves restorative justice.”

R12 “Restorative justice is achieved in the Sulha process.” “The Israeli public thinks that the Sulha process achieves restorative justice and contributes to increasing public confidence in the courts.” “The Israeli public thinks that the contribution of the Sulha process to restorative justice is almost absolute.”

R13 “Yes, certainly the Sulha process achieves restorative justice.” “The Israeli public thinks that the Sulha process achieves restorative justice and contributes to society.”

R14 “In my view, generally, the Sulha process achieves restorative justice, and is better than the formal criminal process.” “Sulha achieves restorative justice in society, and Israeli society and the [Israeli] public believe in this and think that the Sulha process achieves restorative justice.”

R15 “Sulha can restore the injuries [of those involved with an offense].” “The Israeli public thinks that there are instances in which Sulha indeed is vital and positive, especially among genteel families.”

R16 “Sulha is important and effective as a solution for conflicts.” “In the eyes of the Israeli public, Sulha contributes to settlement of conflict and achieves restorative justice.” “It is the best ‘verdict’ in terms of the outcome.”

Respondents were asked whether, in practice, the Sulha process in Israel achieves its principal purpose, namely restoring injuries by settling a conflict that came about as a result of an offense committed by the offender against the victim of the offense and the community. All respondents but one stated that in practice the Sulha process in Israel achieves restorative justice and does in fact restore the injuries resulting from the offense committed by the offender against the victim of the offense and the community:

R1 “Yes, the principal purpose of the Sulha process in Israel is achieved in practice. Restorative justice has been done after the Sulha process and no Sulha agreement whatsoever has ever been breached.”

R2 “Yes, the principal purpose of the Sulha process in Israel is achieved in practice, through reconciliation and instilling peace between those involved with an offense.”

R3 “To the best of my knowledge, the Sulha process in Israel achieves its central purpose, settles the conflict, and achieves restorative justice.”

R4 “Indeed, the principal purpose of the Israeli Sulha process is achieved in practice: reconciliation takes place between the victim of the offense and the offender, and both go back and are integrated in society.”

R5 “Yes. The Israeli Sulha process achieves a compromise that is acceptable to and agreed upon by the parties to the offense.”

R6 “Indeed, the Sulha process in Israel restores injuries by settling the conflict that resulted from a criminal act between the offender, and the victim of the offense and the community.”

R7 “I see that the principal purpose of the Sulha process in Israel is indeed achieved in practice.”

R8 “In my view, the principal purpose of the Israeli Sulha process is indeed achieved in practice. The Sulha process is conducted with the consent of those involved with the criminal act (the victim and the offender), and its outcome is acceptable to them and to the community.”

R9 “The principal purpose of the Sulha process in Israel is achieved in practice.”

R10 “The Sulha process in Israel achieves its principal purpose with the consent of all parties involved with the criminal act and conclusion of the conflict.”

R11 “Yes. The Sulha process in Israel does in practice achieve its principal purpose.”

R12 “In my humble opinion, the principal purpose of the Sulha process in Israel is indeed achieved in practice: the Sulha process in practice accomplishes restorative justice.”

R13 “Restoration of injuries through settlement of the conflict that resulted from a criminal act between the offender and the victim and the community is indeed achieved in practice in the Sulha process in Israel.”

R14 “The principal purpose of the Sulha process in Israel is indeed achieved in practice in Israel. At the end of the process, reconciliation and peace are achieved and the offender reintegrates in society.”

R15 “In my humble opinion, the principal purpose of the Sulha process in Israel generally is not achieved in practice.”

R16 “The Sulha process in Israel does in practice achieve its principal purpose and parallels the restorative justice model.”

Respondents were asked what might be done in order to improve the existing Sulha process in Israel. The vast majority of respondents answered that the existing Sulha process in Israel should be improved by its integration in the Israeli criminal process. Some respondents proposed appointing professional, objective Sulha members (*jaha* members) who are respected by society and have a legal education:

R1 “People who are professional, respected jurists should be integrated among the Sulha Council members.”

R2 “The Sulha Council would be comprised of people who are experienced, respected by society, preferably with legal education; what is most important is that there be recognition of Sulha in the legal system in Israel and that the Sulha process be incorporated in the Israeli criminal process.”

R3 “Make sure that there are respected people with legal education on the Sulha council. Incorporate the Sulha process in the Israeli criminal process.”

R4 “Incorporation of people of the law within the Sulha process, including jurists and retired judges.” “Incorporate the Sulha process in the Israeli criminal process.”

R5 “Recognize the Sulha as a binding institution in the state.”

R6 “Recognize the Sulha process among modes of investigation and as binding in every case.”

R7 “Incorporate the Sulha process in the Israeli criminal process; appoint professional, objective, and respected Sulha Council members representing the entire population of the state.”

R8 “The Sulha process should be given binding legal status.”

R9 “The Sulha process should be given binding legal status as part of the criminal process.”

R10 “Incorporate Sulha in Israeli criminal law as a binding process.”

R11 “The institution of Sulha should be recognized in the legal system in Israel and given binding legal force.”

R12 “The Sulha process should be recognized as a type of mediation, regulated through statutory laws, and recognized as a model for conflict settlement in the Israeli criminal process.”

R13 “Incorporate the Sulha process in the legal system in Israel and the Israeli criminal process.”

R14 “Incorporate the Sulha process in the Israeli criminal process and its regulation through statutory laws. Jurists should be appointed among the members of the Sulha council.”

R15 “Regulate the Sulha process through statutory laws and determine in what manner it will be incorporated in the Israeli criminal process.”

R16 “Recognize Sulha agreements as ‘plea agreements’ recognized in the Israeli criminal process and appoint attorneys and jurists to the Sulha Council.”

### **3.5.5. Sulha, Reconciliation, and Instilling Peace between the Parties affected by the Criminal Act**

Respondents were asked to identify the contribution of the Sulha process in Israel to reconciliation and instilling peace in Israeli society. The vast majority of respondents answered that the Sulha process in Israel makes a great contribution to reconciliation and instilling peace in Israeli society:

R1 “Quite a great contribution.”

R2 “Israeli society, for the most part, prefers the Sulha process because it restores the injuries of those involved with the offense and strengthens reconciliation and peace in society.”

R3 “The Sulha procedure makes a positive and highly significant contribution to reconciliation and instilling peace in society.”

R4 “Quite a great contribution that strengthens brotherhood and mutual responsibility in society.”

R5 “Quite a great contribution: in places where trial has not succeeded, Sulha has produced stunning results.”

R6 “The contribution of the Sulha process to reconciliation and instilling peace is quite great.”

R7 “There is no doubt that Sulha makes quite a great contribution to reconciliation and instilling peace in society.”

R8 “The Sulha process solves conflicts in society to the satisfaction of both parties and the community.”

R9 “The Sulha process is an effective process in traditional Arab society. It should be extended as much as possible to all of society in Israel. It is effective and successful.”

R10 “The Sulha process achieves reconciliation between the parties to an offense and society.”

R11 “The contribution of the Sulha process in Israeli society is tremendous.”

R12 “The contribution of the Sulha process to society is in instilling peace between the parties to the offense for the long term and settling the conflict in the manner of restorative justice.” “Sulha settles conflicts that the legal system cannot settle.”

R13 “The Sulha process makes a great contribution to reconciliation and instilling peace in Israeli society.”

R14 “The Sulha process contributes to reconciliation and instilling peace in Israeli society.”



R15 “Its contribution is not sufficient.”

R16 “The Sulha process in Israel makes quite a great contribution to Israeli society.”  
“The best ruling is Sulha.”

Respondents were asked whether, in practice, the Sulha process in Israel achieve its ancillary purpose of reconciliation and instilling peace between the parties affected by the criminal act. All of the respondents answered affirmatively, i.e. that the Sulha process in Israel does in practice achieve reconciliation and instills peace between the parties affected by the criminal act:

R1 “Yes. Reconciliation and peace between the parties affected by the criminal act are achieved.”

R2 “Yes. Reconciliation and peace between the parties involved with the offense are achieved.”

R3 “Sulha achieves its purpose, and reconciliation and peace between the parties involved with the offense are achieved.”

R4 “Indeed, reconciliation and peace between the parties affected by the criminal act are achieved and life resumes its course.”

R5 “There is no doubt that the purpose of Sulha is achieved.”

R6 “Indeed, reconciliation and peace between the parties affected by the criminal act are achieved absolutely.”

R7 “Yes.”

R8 “Reconciliation and peace are achieved in the Sulha process.”

R9 “Reconciliation and peace are achieved in the Sulha process.”

R10 “Yes, certainly.”

R11 “Yes, and this is true in practice.”

R12 “The Sulha process instills peace and serves the interests of the law-enforcement system. This process rehabilitates the relationship between the offender and his family, and the victim of the offense and his family. This process bears within it a contribution to reduction of violence and achievement of a public and communal order.”

R13 “Yes, certainly.”

R14 “Yes.”

R15 “Yes, it happens every day.”

R16 “Yes, the Sulha process brings an immediate end to the conflict at its start.”

Finally, respondents were asked what might be done to improve the Sulha process in Israel in terms of achieving reconciliation and instilling peace in Israeli society. All respondents but one stated that Sulha should be given legal status and incorporated in the Israeli criminal process:

R1 “The Sulha process in Israel is totally fine.”

R2 “Incorporate it in the Israeli criminal process.”

R3 “Incorporate Sulha in the criminal process, with recognition of this process by the State.”

R4 “Incorporation of the Sulha process in the Israeli criminal process.”

R5 “Recognition of the Sulha process and its institutionalization in the Israeli criminal process.”

R6 “Recognition of the Sulha process in Israeli law as part of the criminal process.”

R7 “Turn the Sulha process into a binding process in the Israeli criminal process.”

R8 “The Sulha process should be given binding legal status in the Israeli criminal process.”

R9 “Give the Sulha process binding legal status in Israel.”

R10 “Incorporate the Sulha process in the Israeli criminal process.”

R11 “Give binding legal status to the Sulha process in the Israeli criminal process.”

R12 “Regulate the Sulha process through statutory laws, as part of the Israeli criminal process and a conflict settlement mechanism.”

R13 “Incorporate the Sulha process and a Sulha council in the Israeli criminal process.”

R14 “Give binding legal status to the Sulha process and incorporate it in the Israeli criminal process.”

R15 “Regulate the Sulha process through statutory laws and incorporate it in the Israeli criminal process.”

R16 “Recognize Sulha agreements as ‘plea agreements’ and incorporate the Sulha process in the Israeli criminal process.”

### **3.6. Delphi Panel Data**

A seven-member (D1–D7) Delphi panel was convened. Following are descriptions of the Delphi panelists:

D1 Chief Clerk and Northern District court administrator emeritus. He has served in this position nearly 37 years. He also has served as an advisor to the director of courts of Israel. He was a member of the State Employees Disciplinary Court. Finally, he has for some time served as chairman of a Sulha Council in the Western Galilee.

D2 An attorney by training. He has served as a police prosecutor in the Northern District for some 18 years. He is extremely well-versed in the Israeli criminal process.

D3 A social worker by profession. He holds a master’s degree in social work. He has served as a senior probation officer for adults in the Haifa/Northern District for some 11 years. He appears at court, prepares probation reports on detainees and accused parties for the courts, and regularly appears in court in criminal proceedings.

D4 The founder and director of the first Arab International Peace Center in the Galilee. He is very active in efforts toward coexistence and peace in Israel. He is the preeminent expert on the Sulha process in Israel. He has served as chairman of a Sulha council for decades. A distinguished man who has the respect of society. He authored a book about Sulha. He has been awarded many prizes in recognition of his activity in settling conflicts, reconciliation, and instilling peace in society.

D5 A distinguished public figure, respected by society. He has filled a number of positions, including acting mayor of a city in the north, assistant to the Defense Minister, and Sulha Council member. Today he serves as chairman of a Sulha Council in the North.

D6 An attorney by profession. He earned a master's degree in law at a prestigious Israeli university. He worked as an independent attorney. He served as a justice on a magistrate court and subsequently as a district court judge. He was appointed vice president of the magisterial courts. During his 31-year tenure as justice and vice president, he heard criminal cases.

D7 An attorney by training. He is the owner and director of a major Israeli law firm. He also has represented suspects and accused individuals in court for decades. He is very active in the Israel Bar Association and serves there in a very senior capacity. He is an activist. A board member of several Israeli academic institutions. He has served as president of an academic college for the past eight years. He has been awarded prestigious prizes for his professional, public, and social efforts to boost Jewish–Arab relations in Israel. Finally, he also serves as chairman of a Sulha Council in Israel.

Following the process of collecting qualitative data from the interviews, a Delphi process was conducted to corroborate and validate the qualitative data collected during research. The Delphi process was conducted in two rounds. In section 4.6.1 I shall present the data obtained from the first round of the Delphi panel. In section 4.6.2 below, I shall present the data obtained from the second round.

### **3.6.1. Delphi Panel: First Round**

In the first round, each Delphi panelist was asked to discuss the data obtained from the interviews, which was divided into the following five categories:

- a. Justice and the criminal process in Israel.
- b. Public confidence and the Israeli criminal process.
- c. Distortion of justice (erroneous rulings) in the Israeli criminal process.
- d. Sulha and restorative justice.
- e. Sulha, reconciliation, and instilling peace between the parties affected by the criminal act.

Following are the questions, answers, and comments of the Delphi panelists:

### **3.6.1. a. The Category of Injustice and the Israeli Criminal Process**

**1.** Interviews were one of the means used to collect data in this study. Respondents were asked whether justice is in practice achieved by the criminal process. The vast majority of respondents answered that justice is not in practice achieved by the Israeli criminal process. Some responded that relative or partial justice is achieved. What is your opinion?

D1 “Justice in the Israeli criminal process is lacking, as has been proven by many studies.”

D2 “There is relative justice.”

D3 “I agree with the view of the majority of respondents. There is, in practice, no justice in the Israeli criminal process.”

D4 “There is relative justice.”

D5 “There is relative justice.”

D6 “I agree that justice is not in practice achieved by the Israeli criminal process.”

D7 “I agree that justice is not in practice achieved by the Israeli criminal process. Justice is difficult to obtain.”

**2.** Respondents were asked to identify the contribution of the Israeli criminal process to justice, as perceived by Israeli society and the Israeli public. The vast majority of respondents answered that most of the Israeli public thinks that the Israeli criminal process does not achieve justice. What is your opinion?

D1 “It is correct that the Israeli public and [Israeli] society think that the criminal process does not achieve justice.”

D2 “I agree. Most of the Israeli public thinks that justice is not achieved by the Israeli criminal process.”

D3 “I agree. Most of the Israeli public thinks that the Israeli criminal process does not achieve justice.” “There is a lack of confidence in the criminal process.”

D4 “I agree. Most of the Israeli public thinks that the Israeli criminal process does not achieve justice.”

D5 “I agree. Rightly, most of the Israeli public thinks that the Israeli criminal process does not achieve justice and the Israeli public does not believe in the court system.”

D6 “Correct; I agree. Most of the Israeli public thinks that the criminal process does not achieve justice.”

D7 “I agree. There is need of a fundamental change in the Israeli criminal process and its outcomes.”

**3.** Respondents were asked whether there is speedy justice (as opposed to delayed justice) in the Israeli criminal process. All of the respondents answered that there is not speedy justice in the criminal process. What is your opinion?

D1 “I agree. There is no speedy justice in the Israeli criminal process.”

D2 “I agree. There is no speedy justice in the Israeli criminal process.”

D3 “I agree. Rulings are given a long time after commission of the offense, and there is no speedy justice in the Israeli criminal process.”

D4 “I agree. There is no speedy justice in the Israeli criminal process.”

D5 “I agree. There is no speedy justice in the Israeli criminal process.”

D6 “Correct; I agree.”

D7 “I agree.”

**4.** Respondents were asked what might be done in order to improve the Israeli criminal process. Most respondents answered that the criminal justice system should be reinforced and professional judges, prosecutors, and investigators should be appointed. A vast majority of respondents also stated that alternative modes of conflict settlement, such as mediation and Sulha, should be incorporated in the Israeli criminal process. What is your opinion?

D1 “I agree. Sulha should be incorporated in the Israeli criminal process.”

D2 I agree. Alternative modes of conflict settlement should be incorporated in the Israeli criminal process, such as Sulha, which is effective.”

D3 “I agree. Mediation and Sulha must be incorporated in the Israeli criminal process.”

D4 “I agree. It is necessary to incorporate alternative modes in criminal law, especially Sulha, which is part of the culture of the Arab minority.”

D5 “I agree. I would emphasize that alternative modes of conflict settlement be incorporated in the Israeli criminal process, especially Sulha.”

D6 “Correct; I agree. Professional judges, prosecutors, and investigators should be appointed and alternative modes of conflict settlement should be incorporated in the Israeli criminal process, such as mediation and Sulha.”

D7 “I agree. Sulha must be incorporated in the criminal process.”

**5.** Respondents were asked what might be done in order to improve the Israeli criminal process so as to achieve speedy justice. The vast majority of respondents answered that alternatives to criminal trial, such as mediation and Sulha, should be incorporated in the Israeli criminal process. Some respondents answered that the caseload of the courts should be lessened and professional judges, prosecutors, and investigators should be appointed, so as to shorten the criminal process and hand down rulings soon after commission of the crime. Some responded that the victim of an offense should be further integrated within the criminal process. What is your opinion?

D1 “I agree that Sulha should be incorporated in the Israeli criminal process.”

D2 “I agree that alternative approaches to criminal trial should be incorporated in the Israeli criminal process, such as mediation and Sulha.”

D3 “I agree that Sulha should be incorporated in the Israeli criminal process; Sulha integrates the victim of the offense in the criminal process.”

D4 “I agree. It is necessary to incorporate alternative approaches to criminal trial in the Israeli criminal process—especially Sulha. It is necessary to shorten the criminal process.”

D5 “I agree, and it is imperative to integrate Sulha and the victim of the offense in the Israeli criminal process.”

D6 “I agree. Alternative approaches to criminal trial should be incorporated in the Israeli criminal process, such as mediation and Sulha. The caseload of the courts should be reduced. Appoint professional judges, prosecutors, and investigators. The criminal process should be shortened and rulings should be handed down soon after commission of the crime. The victim of the offense should be integrated within the Israeli criminal process.”

D7 “I agree with the answer of the vast majority of respondents: Sulha must be incorporated in the Israeli criminal process.”

### **3.6.1. b. Public Confidence and the Israeli Criminal Process**

**6.** Respondents were asked whether the Israeli public has confidence in the legal system in Israel. Most respondents answered that most of the Israeli public lacks confidence in the Israeli criminal process. What is your opinion?

D1 “I agree. Most of the Israeli public lacks confidence in the Israeli criminal process.”

D2 “I agree. Most of the Israeli public lacks confidence in the Israeli criminal process.”

D3 “I agree. The Israeli public lacks confidence in the Israeli criminal process. The Israeli public is right.”

D4 “I agree. There is no confidence in the legal system in Israel.”

D5 “I agree. There is no confidence in the Israeli criminal process because there is no speedy justice in it and it does not put an end to the conflict.”

D6 “I agree. Most of the Israeli public lacks confidence in the Israeli criminal process.”

D7 “I agree. Most of the Israeli public lacks confidence in the Israeli criminal process. Recently there has been a deterioration in public confidence in the legal system in general and in the criminal process and its outcomes in particular.”



**7.** Respondents were asked to identify the purpose of public confidence in the Israeli criminal process, as perceived by Israeli society and the Israeli public. The vast majority of respondents answered that public confidence in the Israeli criminal process is an important and crucial condition, and practically it is the only guarantor of a sustained, just legal system and criminal process in a democratic state. What is your opinion?

D1 “I agree.”

D2 “I agree.”

D3 “I definitely agree.”

D4 “I agree. Public confidence in the criminal process is very important for sustaining a democratic state.”

D5 “I agree. It is important that the public have confidence in the legal system.”

D6 “I agree. Public confidence in the Israeli criminal system is an important and crucial condition, and practically it is the only guarantor of sustained, just law and criminal process in a democratic state.”

D7 I agree with the responses of the vast majority of respondents.”

**8.** Respondents were asked what might be done in order to improve public confidence in the Israeli criminal process. All of the respondents answered that the Israeli criminal process should be rationalized and improved. According to the vast majority of respondents, rationalization and improvement of the criminal process would entail the following processes: shortening the criminal process, greater consideration of the rights of the victim of an offense, reduction of the caseload of the courts, and implementation of alternative approaches to criminal trial such as mediation and Sulha. What is your opinion?

D1 “I agree. Incorporating Sulha in the Israeli criminal process would significantly reduce the case load, significantly speed up the criminal process.”

D2 “I agree with all of the respondents’ answers.”

D3 “I definitely agree with all of the respondents’ answers.”

D4 “I agree. The criminal process should be shortened, the rights of the victim of the offense should be guaranteed, and Sulha should be incorporated in the Israeli criminal process.”

D5 “I agree. The criminal process should be moved forward. Take into consideration the rights of the victim of the offense, implementation of alternative processes to criminal trial, and incorporation of Sulha in the Israeli criminal process.”

D6 “Quite correct; I agree.”

D7 “I agree that it is necessary to rationalize and improve the criminal process, especially through incorporation of Sulha in the Israeli criminal process.”

### **3.6.1. c. Distortion of Justice (Erroneous Rulings) and the Israeli Criminal Process**

**9.** Respondents were asked whether there is distortion of justice (erroneous rulings) in the Israeli criminal process. The vast majority of respondents answered that there is distortion of justice in the criminal process and that there are erroneous rulings. The conviction rate in criminal cases is very high and there are virtually no exonerations. What is your opinion?

D1 “I agree. There is distortion of justice in the Israeli criminal process.”

D2 “I agree. There is distortion of justice in the Israeli criminal process.”

D3 “I agree. There is distortion of justice in the Israeli criminal process. The conviction rate is very high and there are no exonerations.”

D4 “I agree. With certainty, there is distortion of justice in the Israeli criminal process.”

D5 “I agree. Recently there is quite a great deal of distortion of justice.”

D6 “Correct; I agree with the answers of the vast majority of respondents.”

D7 “I agree with the answer of the vast majority of respondents that there is distortion of justice (erroneous rulings) in the Israeli criminal process.”

**10.** Respondents were asked what might be done so as to improve the Israeli criminal process in order to prevent distortion of justice (erroneous rulings). The vast majority of respondents answered that the criminal process should be rationalized and improved in

several ways: safeguarding the rights of the parties to the process, including those of the victim of an offense; reduction of the caseload; and implementation of alternatives to trial, such as mediation and Sulha. What is your opinion?

D1 "I agree."

D2 "I agree."

D3 "Correct; I agree."

D4 "I agree."

D5 "I agree."

D6 "I agree."

D7 "I generally agree. It is necessary to incorporate Sulha in the Israeli criminal process."

#### **3.6.1. d. Sulha and Restorative Justice**

**11.** Respondents were asked what they thought of the Sulha process in Israel and whether this process achieves restorative justice. An absolute majority of respondents answered that the Sulha process achieves restorative justice. What is your opinion?

D1 "I agree. Certainly the Sulha process achieves restorative justice."

D2 "I agree that the Sulha process achieves restorative justice."

D3 "I agree."

D4 "I agree. Sulha achieves restorative justice."

D5 "I agree."

D6 "I agree. The Sulha process achieves restorative justice."

D7 "I agree. The Sulha process achieves restorative justice."

**12.** Respondents were asked to identify the contribution of the Sulha process in Israel to restorative justice as perceived by Israeli society and the Israeli public. All of the respondents answered that Israeli society and the Israeli public accept the Sulha process and are satisfied with it, because it delivers restorative justice. What is your reaction?

D1 "I agree."

D2 "I agree."

D3 "I agree. Israeli society and the [Israeli] public are satisfied with the Sulha process because it achieves restorative justice, reconciliation, and peace."

D4 "I agree. Sulha delivers restorative justice."

D5 "I agree. The Israeli public accepts the Sulha process and is satisfied with it, because it delivers speedy, immediate justice."

D6 "Correct; I agree."

D7 "The Sulha process achieves restorative justice; this is correct."

**13.** Respondents were asked what might be done in order to improve the existing Sulha process in Israel. The vast majority of respondents answered that the existing Sulha process in Israel should be improved by incorporation of the Sulha process in the Israeli criminal process. Some respondents proposed appointing professional, objective Sulha functionaries (*jaha* members) who are respected by society and have legal education, such as attorneys and retired judges. What is your opinion?

D1 "I agree. Sulha should be incorporated in the Israeli criminal process. I agree with the respondents' answer regarding the criteria for appointment of Sulha council members."

D2 "I agree. Sulha should be incorporated in the Israeli criminal process and *jaha* member who are professionals, such as retired judges and retired prosecutors, should be appointed."

D3 "I agree. It is necessary to incorporate Sulha in the Israeli criminal process and to appoint professional Sulha council members who have legal education."

D4 "I agree. Sulha should be incorporated in the Israeli criminal process."

D5 "I agree. Sulha should be incorporated in the Israeli criminal process and professional, objective Sulha council members who are respected by society and have legal education should be appointed."

D6 "Correct; I agree. The Sulha process should be improved through its incorporation in the Israeli criminal process and professional, objective Sulha members who are respected by society and have legal education should be appointed.

D7 "I agree. The Sulha process should be incorporated in the Israeli criminal process and Sulha members who have legal education and are objective, intellectual, and social leaders should be appointed."

**14.** Respondents were asked whether, in practice, the Sulha process in Israel achieves its principal purpose, namely restoring injuries by settling the conflict that came about as a result of the criminal act between the offender, and the victim of an offense and the community. All respondents but one answered that the Sulha process in Israel achieves restorative justice and restores the injuries that came about due to the offense between the offender, and the victim of the offense and the community. What is your opinion?

D1 "I agree. The Sulha process in practice achieves restorative justice."

D2 "I agree. Sulha in practice achieves restorative justice."

D3 "I agree. Indeed, the Sulha process in practice achieves restorative justice."

D4 "I agree. Indeed, the Sulha process in practice achieves its principal purpose, which is restorative justice."

D5 "I agree. The Sulha process in Israel does in practice achieve restorative justice. It strengthens the social connection between the offender and the victim of the offense."

D6 "Correct; I agree. The Sulha process in Israel does in practice achieve restorative justice."

D7 "I agree. The Sulha process in Israel does in practice achieve restorative justice, when conducted correctly."

### **3.6.1. e. Sulha: Reconciliation and Instilling Peace between Parties Affected by the Criminal Act**

**15.** Respondents were asked whether in practice the Sulha process in Israel achieves its ancillary purpose of reconciliation and instilling peace between the parties affected by the criminal act. All of the respondents answered affirmatively, i.e. that the Sulha

process in Israel achieves reconciliation and instills peace between the parties affected by the criminal act. What is your opinion?

D1 "I agree. The Sulha process in practice achieves its ancillary purpose of reconciliation and instilling peace between the parties affected by the criminal act."

D2 "I agree."

D3 "I definitely agree."

D4 "I agree."

D5 "I agree. The Sulha process achieves reconciliation and instills peace between the parties involved in the conflict."

D6 "Correct; I agree. The Sulha in practice achieves reconciliation and peace between the parties affected by the criminal act."

D7 "I agree. In practice, Sulha in Israel achieves reconciliation and peace between the parties affected by the criminal act." "All those close to the parties affected by the criminal act should be incorporated in the Sulha process."

**16.** Respondents were asked to identify the contribution of the Sulha process in Israel to reconciliation and peace in Israeli society. The vast majority of respondents answered that the Sulha process in Israel makes quite a great contribution to reconciliation and peace in Israeli society. What is your opinion?

D1 "I agree."

D2 "I agree."

D3 "I agree. The Sulha process in Israel indeed makes quite a great contribution to reconciliation and peace in Israeli society."

D4 "I agree. Sulha makes quite a great contribution to reconciliation and peace in Israeli society."

D5 "I agree."

D6 "I agree. The Sulha process in Israel makes quite a great contribution to reconciliation and peace in Israeli society."

D7 "I agree. The Sulha process in Israel makes quite a great contribution to reconciliation and peace in Arab-Israeli society."

17. Finally, respondents were asked what might be done to improve the Sulha process in Israel in terms of achieving reconciliation and instilling peace in Israeli society. All respondents but one answered that the Sulha process should be given legal status and incorporated in the Israeli criminal process. What is your opinion?

D1 "I agree. The Sulha process should be given legal status and incorporated in the Israeli criminal process."

D2 "I agree."

D3 "I agree. In my opinion, Sulha should be given legal status and incorporated in the Israeli criminal process."

D4 "I agree. Sulha should be given legal status and recognized as part of the Israeli criminal process."

D5 "I agree. Sulha should be given legal status; Sulha must be incorporated in the Israeli criminal process."

D6 "I agree. Sulha should be given legal status and incorporated in the Israeli criminal process, and this would rationalize the criminal process."

D7 "I agree in principal that Sulha should be incorporated in the Israeli criminal process."

### 3.6.2. Delphi Panel: Second Round

The second Delphi round focused on the manner in which Sulha ought to be incorporated in the Israeli criminal process, on the basis of the data collected. At the end of the round, an amendment to PCL was drafted to the satisfaction of all of the Delphi panelists. The bill/law draft is attached as **Appendix F**.

The bill seeks to incorporate the Sulha process in all stages of the Israeli criminal process: the investigative stage prior to indictment, the stage following indictment, that of sentencing (establishing a punishment), and the stage of conditional release from imprisonment under a decision of the parole commission.

Under the bill, the Sulha process would be entrenched in a procedure whose details would be established by the Minister of Public Security with the consent of the Minister of Justice and would include, inter alia, considerations, conditions, and arrangements for diverting the offender to the Sulha process; threshold conditions for conducting the process; and provisions concerning the Sulha Council. The bill is based on experience attempting to contend with the criminal act with an appropriate alternative approach, which in turn turns on the assumption that the Israeli criminal process does not always constitute an appropriate and just solution for all of the actors involved with it (the offender, the victim of the offense, and the community/society). The bill defines “the Sulha process,” the “procedure” to be established by the Minister of Public Security with the consent of the Minister of Justice, and the “Sulha Council.” The bill provides that an authorized police officer shall be authorized to divert a person suspected of committing an offense to a Sulha *process*, to be conducted in accordance with the provisions of the procedure, provided that all of the following conditions are fulfilled: the suspect has consented to the Sulha process after being provided with the requisite information regarding the nature of the Sulha process and the likely ramifications of the process on his legal status, and the suspect accepts responsibility for the criminal act.

The bill further specifies that upon conclusion of the Sulha process, the chairman of the Sulha Council responsible for conducting the Sulha process shall submit to the police a report on the Sulha process and the recommendation of the Sulha Council regarding the offender. Completion of the Sulha process shall constitute a central and decisive consideration in any decision regarding the continuation of criminal process concerning the offender, and if he has not yet been put to trial, no decision shall be made to put him to trial, unless the district attorney or his representative finds that doing so is justified by special reasons, which shall be given in writing.

The bill also provides that the “procedure” to be established by the Minister of Public security with the consent of the Minister of Justice shall establish the types of criminal processes for which a Sulha process is appropriate, and shall include, inter alia, provisions regarding the following :the consideration and conditions for diversion of the offender to a Sulha process; threshold conditions for conducting a Sulha process; the composition of the Sulha Council, the qualifications required to serve as a Sulha Council member, and the manner of appointment of a Sulha Council; confidentiality of



anything that is said or submitted within the context of the Sulha process; and the ramifications of completion and of non-completion of the Sulha process.

The bill further proposes to amend section 146 of PCL, which regulates the preliminary claims that the accused may put forward following the beginning of the trial, such that a subsection is added under which, following the beginning of the trial, the accused may put forward the preliminary claim that a Sulha process has been conducted and concluded with the signing of a Sulha agreement, and in the event that the claim is accepted, the court shall be authorized to void the indictment.

The bill further proposes that PL be amended by the addition of section 340d(2), under which, in the event that a Sulha process was conducted and concluded with the signing of a Sulha agreement, the court shall deviate from the normal scope of punishment and shall substantially ease the penalty of the guilty party.

Moreover, the bill proposes that sections 13 and 21 of CPLEPA be amended so that if a Sulha process has been conducted and a Sulha agreement has been signed between the suspect or the accused and the victim of the offense, it shall be presumed that there are no grounds for detention of the suspect or accused.

Finally, the bill proposes that section 9 of RFIPL be amended so that in making a decision concerning early release of a prisoner, a parole commission include among its considerations any Sulha agreement that has been signed between the prisoner and the victim of the offense, and that the Sulha agreement be among the considerations of the President of the State in granting amnesty to a prisoner.

### **3.7. Professional Experience of the Researcher**

The researcher is a judge who has sat on magistrate courts of the Northern District for some 18 years. He has served as vice president of the court and serves on several magistrate courts in the north. He also heard criminal cases. In 2016 he was appointed as a judge in District Court. Prior to his appointment as a judge, he was an independent attorney as well as served as a member of a Sulha Council. The researcher also served as chairman of a parole commission. His extensive professional experience has made clear that the Sulha process has not yet been entrenched in statutory laws.

Notwithstanding, in practice Sulha is brought to bear in the criminal process in appropriate instances and under the conditions that have been established by the courts

and parole commissions, with regard to detention, punishment, early release, and amnesty.

Further, there is criticism by Israeli society and by the Israeli public of the courts and of Israeli judges, and public confidence in the legal system and judges has been in decline of late. Most of the public is interested in incorporation of the Sulha process in the Israeli criminal process because the Sulha process achieves restorative justice and reconciliation and instills peace in society.

In many discussions held by the researcher with a great number of judges, attorneys, prosecutors, probation officers, parole commission members, Sulha Council members, and academics, there was a consensus in favor of incorporation of the Sulha in the Israeli criminal process because it is effective in achieving restorative justice and reconciliation and in instilling peace in Israeli society; involves the victim of the offense in the criminal process; reduces the caseload of the courts, police, and State Attorney; rationalizes the criminal process; precludes, to the extent possible, erroneous rulings and distortion of justice; and would increase the Israeli public's confidence in the legal system in general and in the criminal process in particular.

## **Chapter Four: Discussion**

### **4.1. Preamble**

The goals of this study, as presented in Chapter 1, were as follows:

1. To describe and explore the legal status of the institution of Sulha in Israeli criminal law (both substantive and procedural).
2. To propose a legal model (a law draft) for incorporation of the institution of Sulha within Israeli criminal law.

The three research questions are as follows:

1. What is the legal status of Sulha in Israeli criminal law?
2. How can the Sulha be incorporated in Israeli criminal law, and what contribution would Sulha make in this respect?
3. What action is required for Sulha to be incorporated in Israeli criminal law?

This qualitative-interpretive study was designed and conducted as an exploratory-holistic single case study.

The qualitative data were gathered from valid, reliable sources: documents, interviews, a Delphi survey, and the researcher's professional experience and personal diary.

In this chapter I presented my interpretation of the data by making "sense and meaning from the data that constitute the findings of the study" (Merriam, 1998, p. 178). I broke the data into manageable units, organised them into categories, interpreted and synthesised them, and identified patterns. In other words, I sought to build a coherent interpretation picture from the data so as to "find any or all relationships that exist with reference to the research questions" (Dooly, 2002, p. 342).

## 4.2. The First Research Question

Data collection for this question focused on criminal statutory laws, rulings, and general decisions issued by the courts (Supreme Court, district courts, and magistrate courts), as well as parole committee decisions. The principal sources of information on the matter are official legal documents: statutory laws, rulings, decisions of general courts and parole committees, the professional literature, and the researcher's professional experience. The data gathered from the above sources show that criminal statutory laws (PL, CPL, YJPTL, CPLEPA, BLPS, CRFPL, CL) do not recognize the institution of Sulha as an alternative conflict settlement process to the current Israeli criminal process. Only in YJPTL (section 12a), in the context of a probation officer's evaluation of a juvenile offender, is there recognition of an alternative process to the criminal process.

Israeli courts do not recognize the institution of Sulha as an alternative process to the current criminal process. A review of the data gathered shows that there are two principal approaches (schools) to the question of the legal status of the institution of Sulha in Israeli criminal law: One approach (school) champions the paradigm of traditional formal criminal justice and refuses to grant the institution of Sulha any binding legal status in Israeli criminal law, while according to the other approach (school)—which today is dominant among judges on all courts and most parole committees—Sulha can serve as a consideration in a person's favor, whether with regard to detention, punishment, or conditional release, but not as a *decisive consideration*, and certainly not one that *binds the courts* or parole committees, whether at the point of detention or that of sentencing or at the point of rendering a decision regarding conditional release of the prisoner.

### 4.2.a. Current Israeli Criminal Law, the Principle of Equality Before the Law, and the Right to Uniformity of Punishment

In our view, current Israeli criminal law is not criminal law as it ought to be. From our vantage point, both the asymmetry between statutory criminal law and rulings handed down by the various criminal courts (Supreme Court, district courts, and magistrate courts), on one hand, and parole committee decisions, on the other, as they regard the institution of Sulha, and the fact of the existence of two schools or approaches with regard to Sulha among Israeli judges, courts, and parole committees do not appropriate to justice and to the right to equality before the law—particularly the principle of

uniformity of punishment and the right to due process in criminal law. It is well known that law does not consist merely of rules, but includes values and principles, as well. Discovering truth and doing justice are the foundations of adversarial criminal law

(DCI (Zef) *Antabi v. State of Israel* (not reported, Sep. 19, 2004); CFH 7325/95 *Yedioth Ahronoth, Ltd. v. Crouss*, IsrLR 3 [1998] 111).

The purpose of the criminal process, by the same token, is to discover the truth and do justice while fully preserving the rights of the accused so that he will not experience any distortion of justice (CFH 4603/97 *Mesholam v. State of Israel*, IsrLR 3 [1992] 112, 196).

A criminal process that violates the right of the accused to defend himself not only compromises the fundamental right of the accused to due process, but also obstructs the aim of discovering the truth and doing justice (CrimA 4977/82 *Jabareh v. State of Israel*, IsrLR 2 [1993] 690, 700).

In Israeli law, the principle of equality before the law is one of those comprising “the heart and soul of our entire constitutional order” (HCJ 98/69 *Bergman v. Minister of Treasury*, IsrLR 1 [1969] 695, 698).

It is an integral part of the genetic code of all of justice (HCJ 2671/98 *Israel Women’s Network v. Minister of Labor and Welfare*, IsrLR 3 [1998] 630, 650, 659).

The right to equality is a fundamental right in Israeli law. It is enshrined in the Declaration of Independence, in which the State undertook to grant absolute equality of civil and political rights to all of its citizens. The principle of equality has been given further expression by various laws passed by the Knesset, such as the Women’s Equal Rights Law (1951); the Equal Opportunity in Employment Law (1988); the Equal Retirement Age for Female and Male Employees Law (1987); the Equal Pay for Female and Male Employees Law (1996); and so forth. The right to equality is a constitutional right and a component part of human dignity as established in BLHDL (HCJ 4627/02 *Movement for Quality Government in Israel v. Knesset*, IsrLR 1 [2006] 619).

Inherent in the right to equality is the prohibition against discrimination (HCJ 7426 7426/08 *Tabaka v. Minister of Education* (not reported), Aug. 8, 2010).

Discrimination is defined as “dealing unequally and unfairly with equals” (HCJ 678/88 *Kfar Vradim v. Minister of Treasury*, IsrLR 2 [1989] 501, 507–508).

Discrimination deals a blow to a human being’s dignity as such. Human dignity in Israel is a constitutional right under BLHDL. In Israel, individuals under investigation, suspects, defendants, and prisoners have the right to equality before the law. This is a constitutional right, derived from the principle of equality, which is a part of the constitutional right of human dignity (BLHDL, section 2).

The principle of uniformity of punishment demands that similar sentencing criteria be applied to situations that are similar to each other in terms of the offenses committed and the personal circumstances of the offenders (CrimA 5526/10 *X v. State of Israel* (not reported), Apr. 4, 2011; CrimA 2287/09 *Wahbi v. State of Israel* (not reported), Jan. 25, 2010).

The principle of equality of punishment is a fundamental principle in criminal law that serves “to preclude discrimination between those equal or similar, for the sake of doing justice with the accused and for the purpose of preserving public faith in the criminal process”(CrimA 9792/08 *Hamod v. State of Israel* (not reported), Apr. 1, 2007).

With regard to individuals who stand accused of offenses, the meaning of the rule is that where several accused parties are convicted in the same incident and their actions are similar, their shared responsibility will in principle be expressed through a similar punishment handed down to them (CrimA 9937/01 *Horav v. State of Israel*, IsrLR 6 [2004] 738, 752).

Notwithstanding, the principle of uniformity of punishment is relative and subject to recession in the face of other principles and values (CrimA 6672/03 *Kaminsky v. State of Israel*, IsrLR 2 [2003] 441, 447; CrimA 5640/97 *Raich v. State of Israel*, IsrLR 2 [1999] 433, 470).

A similar ruling was given in CrimM 2649/02 *Bakaiav v. State of Israel* (not reported), May 15, 2002:

“The principle of equality of accused parties before the law and the prohibition against discriminating between them where there are no differences of substance between them are familiar principles and lie at the foundation of a sound criminal process that is just and fair”.

In another case it was ruled that “the principle of uniformity of punishment, derived from the principle of equality before the law, demands that similar sentencing criteria be applied to individuals who have committed similar crimes under similar circumstances” (CrimM 4600/12 *Yashev v. State of Israel* (not reported), Jun. 13, 2012).

Elsewhere it was ruled:

“It is clear to all that in civilized society it is impossible to accept the existence of a double standard of sentencing, as such is inconsistent with the principle of equality, from which are derived secondary principles of sentencing doctrine such as the principle of uniformity of punishment and the prohibition of selective enforcement, and which constitutes a central element of the constitutional character of the Israeli system of justice” (CrimA 5535/12 *Cabri v. State of Israel* (not reported), May 1, 2013).

In the present context, the existence of two approaches/schools among Israeli courts and parole committees with regard to the legal status of Sulha in Israeli criminal law inherently violates the constitutional right of individuals under investigation, suspects, defendants, and prisoners to equality before the law and uniformity of punishment where the situations at hand resemble each other in terms of the offenses committed and the offenders’ personal circumstances. Let us take, for instance, the case of two individuals—A and B—both aged 21, who are investigated, indicted, and convicted of identical offenses, while both lack a criminal record and their personal circumstances are similar. Both also reach Sulha agreements with the victims, and each compensates the victim of his crime. If A is tried in a court belonging to the school that refuses to grant the institution of Sulha binding legal status in the Israeli criminal process, while B is tried in a different court belonging to the other school, for which Sulha can serve as a consideration in favor of the individual in question at both the point of detention and that of sentencing, the result is that the two are given disparate punishments, which is contrary to the principle of justice, the principle of equality before the law, and the right to uniformity of punishment. The same holds true when two prisoners—A and B—who have been convicted of the same offense, have similar personal circumstances, and have reached similar Sulha agreements with their victims and compensated the victims, and whose applications for conditional release come before two parole committees, A being brought before a committee that refuses to grant the institution of Sulha binding legal status in the criminal process and B being brought before another committee that believes Sulha ought to be a consideration in the offender’s favor. The result is that

Prisoner B will likely be conditionally released, whereas Prisoner A is unlikely to be conditionally released. This outcome inherently compromises the principle of justice, the right of the prisoners to equality before the law, and uniformity of punishment.

#### **4.2.b. Current Israeli Criminal Law and the Right to Due Process**

Due process in criminal matters is an expression of the dedication of an enlightened society in a democratic state to conscious action, within the framework of those options that are available, to prevent distortion of justice in criminal law. Assurance of due process in criminal matters also is a means of serving the public interest of discovering the truth and doing justice (HCJ 11339/05 *State of Israel v. Be'erSheva District Court*, IsrLR 3 [2006] 93, 154).

Due process in criminal matters is intended to assure the individual under investigation, suspect, or defendant protection of his rights as a human being that are the birthright of every person (Trechsel, 1997).

The right to due process in criminal matters does not realize only a personal interest of the individual under investigation, suspect, defendant, or prisoner. It is a public interest for every individual in society to know that in the event of a criminal process against him, it will be conducted appropriately and fairly (Goldstein, 1960).

The aim of the right to due process in criminal law is to assure that a fair criminal process is conducted vis-à-vis the individual under investigation, suspect, defendant, or prisoner. It appertains to the criminal process in all its stages.

Note well that the right to due process in criminal law and its scope differ from one legal system to another in the world. Differences exist between various legal systems in the world as a result of the desired point of balance established in each legal system between the public interest in a war against crime and criminals and the interest in ensuring due process in criminal matters (Packer, 1964).

In Israel, the right of the individual under investigation, suspect, defendant, or prisoner to due process in criminal matters is a protected constitutional right. In ArrM 3032/99 *Brans v. State of Israel*, IsrLR 3 [2002] 354, 275, it was ruled that:

“Basic Law: Human Dignity and Liberty [...] passed in 1992, gave a person’s right to due process the status of a constitutional basic right ...The basic law, in section 11,



requires all branches of the government—the legislative branch, the executive branch, and the judicial branch—to respect the rights established within it”.

The right to due process in criminal law comprises a framework right that can serve as a basis for the derivation of many procedural rights of the individual under investigation, suspect, defendant, or prisoner in criminal cases. The right to due process in criminal law includes, *inter alia*, the right of the accused to know why he has been detained and of what he is accused, the right to a public trial by an unbiased and neutral court, the right to legal defense and to present relevant evidence, the right to be represented by an attorney, the right to be present at trial, presumption of innocence, the principle of legality, protection from double jeopardy, and so forth (CrimA 5121/98 *Isasscharov v. MGA*, IsrLR 1 [1999] 461; Cheny et al. 1998, pp. 75–76; Saphire, 1978).

As noted, the right to due process in criminal law includes the principle of legality. Under the principle of legality in criminal matters, there can be neither punishment nor an offense in the absence of an explicit penal law (*nullum crimen sine lege, nulla poena sine lege*). Today, the principle of legality in criminal matters comprises a basic principle in international criminal law and in all the advanced legal systems of liberal democracies, including that in Israel (Rabin and Vaki, 2014).

Ashworth (2006, p. 68), influenced by Raz (1979, pp. 219–221), defined the principle of legality as “being governed by rules which are fixed, knowable and certain.”

The principle of legality also is intimately tied to the notion of the rule of law (Hallevy, 2009).

Liberal political philosophy in effect gave rise to liberal legal thought (Dworkin, 1985).

In criminal law, the liberal legal tradition contains two opposing forces. On the one hand, there is the force exerted by the state (the sovereign) for the purpose of social control, i.e. the power of the state to direct its subjects to behave in a specific manner. Sometimes the direction of this behavior is motivated by protection of specific values, while the crux of the matter in other instances is the social order *per se*, with no direct relevance to particular social values. This power of social control is characteristic of every government in human society, whether ancient or modern, democratic or totalitarian. The difference between various human societies is a function of the balance between legal social control and the *second* force, viz. individualism, which in the

particular context of criminal law takes the form of legal individualism. Legal individualism finds expression in basic human rights (Hallevy, 2009).

In the modern age, legal individualism is the rule as well as the point of departure of the modern liberal state, while legal social control is only an exception and an inescapable limitation on legal individualism required to facilitate healthy social life within organised human society (Dennis, 1997).

State intervention in the individual's life and liberty requires explicit justification by virtue of being the exception. Non-intervention is the rule—the state that is appropriate and desirable (Hallevy, 2009).

Legal individualism is, in effect, an integral part of the rule of law in a democratic state in general, and of the principle of legality in criminal law in particular.

The principle of legality is given three justifications in criminal law. First is that of fairness: the state cannot expect the individual to be sure to comport himself according to laws that were not in existence at the time of the commission of the offense, or else in accordance with secret legislation. Second is preservation of the preventive and educational purpose of criminal law: punishment in accordance with a law that was not in existence at the time of the commission of the offense, with no fair warning given the individual, does not achieve the basic purpose of “directing the behavior of the individual” (Sangero, 2003, p. 166).

Third is fear of arbitrary exercise of power by the sovereign and the need to protect the rights of the individual (Rabin and Vaki. 2014).

In Israel, the principle of legality in criminal law is a constitutional principle enshrined in BLHDL (CrimM 537/95 *Gnemat v. State of Israel*, IsrLR 3 [1995] 355, 421; CrimA 4424/98 *Seldego v. State of Israel*, IsrLR 5 [2002] 528; Kremnitzer, 1999).

Several secondary principles are derived from the principle of legality in Israeli criminal law, namely:

a) The prohibition of judicial legislation. Judges do not make law.PL, in which the principle of legality is rooted, states that:

“Nothing constitutes an offense and there shall be no penalty for it unless it is so prescribed by law or there under.” (Section 1 of the PL).

- b) There must be no retroactive punishment (CrimA 7853/05 *Rahmian v. State of Israel*, Takdin HC. 2006 [9], 2643).
- c) Publication of criminal statutory laws (publicity of the law; CrimM 213/56 *GA v. Alexandarovez* IsrLR 1 [1957], 695).
- d) Clear, detailed, and unequivocal definition of the offense (CFH 1558/03 *State of Israel v. Assad*, IsrLR 5 [2004] 547, 562–563).
- e) The principle of restrictive interpretation in criminal affairs (the rule of lenient interpretation in criminal affairs).

This principle is entrenched in section 34u of PL, which states:

“If an enactment can be reasonably interpreted in several ways in respect of its purpose, then the matter shall be decided according to the interpretation that is most favorable for whoever is about to bear criminal liability under that enactment”.

It is noteworthy that the principle of legality in Israeli criminal law is both a defensive and an offensive weapon against resort to the legal social control of criminal law in a manner that is incompatible with legal individualization. The principle of legality requires that resort to criminal process be had on an equitable basis. Thus where criminal legal action has been taken against one individual, the principle of legality requires that the same action be taken against another individual under appropriate circumstances. Arbitrary resort to the criminal process compromises the principle of legality and is void. Thus, for example, a court is authorized to void a law that is insufficiently clear, i.e. a vague law, on the force of the doctrine known in United States law as “void for vagueness.” The provisions of such a law are seen as in violation of the constitutional right to due process (HCJ 6358/05 *Vaano v. State of Israel*, TK HC. 2006 [1] 320, 331; and in U.S. law, *U.S. v. Reese*, 92 U.S. 214, 219–220 (1875)).

The researcher would argue that the criminal process in Israel, so far as the institution of Sulha is concerned, violates the principle of legality. The existence of two schools among Israeli judges with regard to the institution of Sulha, one refusing to grant the Sulha any binding legal status in Israeli criminal law and the other opining that the Sulha can serve as a consideration in favor of the individual under investigation, suspect, defendant, or prisoner, is contrary to the right to due process in criminal law, and especially the principle of legality in criminal affairs, which requires that resort be

had to the criminal process on a completely equitable basis with regard to all individuals under investigation, suspects, accused parties, and prisoners whose circumstances are comparable.

What is more, in the view of the researcher, the state of legal affairs as perceived by the school according to which Sulha *can* serve as a consideration in favor of the individual under investigation, suspect, defendant, or prisoner under certain circumstances is not clear, consistent, and definitive, but, in essence, vague. It was ruled in CrimA 4257/07 *X v. State of Israel* TK HC 2008 [1], 3774 that:

“This court is fundamentally willing to give some weight to a Sulha arrangement, subject to fulfillment of certain circumstances, whether in the context of detention ...or in the context of sentencing ...” (hereinafter, the X Case).

Indeed, a review of rulings and decisions by the various courts and parole committees shows that the courts and parole committees have not explicitly and precisely defined those “certain circumstances” or “appropriate circumstances” under which they will weigh Sulha in favor of the individual under investigation, suspect, defendant, or prisoner in a criminal case.

Further, there is a *vagueness* to the rulings and decisions issued by the courts and parole committees in all things touching on the *weight* of Sulha as a consideration in favor of the individual under investigation, suspect, defendant, or prisoner, relative to other relevant considerations. Thus in the X Case, for instance, it was ruled that the Sulha had “*some weight*.” In CrimA 8280/11 *Baker v. State of Israel* TK HC. 2012 [2] 1497, the court ruled that “as for the Sulha agreement reached by the parties, for although the Sulha agreement can constitute a consideration in favor of the accused, it is not a decisive consideration” ...

On another occasion, the Supreme Court ruled that:

“In my view, the Sulha conducted between the Respondent and his father ought to be given considerable weight. It appears that no one questions its existence, but the Appellant argues that it ought not be given considerable weight. This argument is bewildering to me (CrimM 1155/4 *State of Israel v. X*, TK HC 2014 [1] 11297).

In another case it was ruled that:

‘Sulha has a sociocultural status not to be ignored, but it is not decisive with regard to release’. (ArrM 7494/13 *State of Israel v. Albahir*, TK HC 2014[4] 10685).

Finally, it was ruled in Arr M 590/08 *State of Israel v. Mresat* TK HC 2008 [1] 878) that:

“Sulha can serve as a factor among the penal considerations of the court ...it can be a certain consideration in sentencing when accompanied by confession and remorse”.

Thus the courts of the State of Israel have not clearly, consistently, and definitively defined the *weight* of Sulha in the criminal process. Rather, they have employed vague notions and in no way addressed its weight. The vague standards established by the courts for the weight due Sulha are: “some weight,” “not a decisive consideration,” “considerable weight,” and “a certain weight”.

In my view, that the vagueness pertaining to those cases in which Sulha could have served as a consideration in favor of the individual under investigation, suspect, defendant, or prisoner, as well as the vagueness pertaining to the definition of the weight of Sulha among the other considerations relevant to the criminal process, compromised the principle of legality, which is part of the right to due process in criminal law.

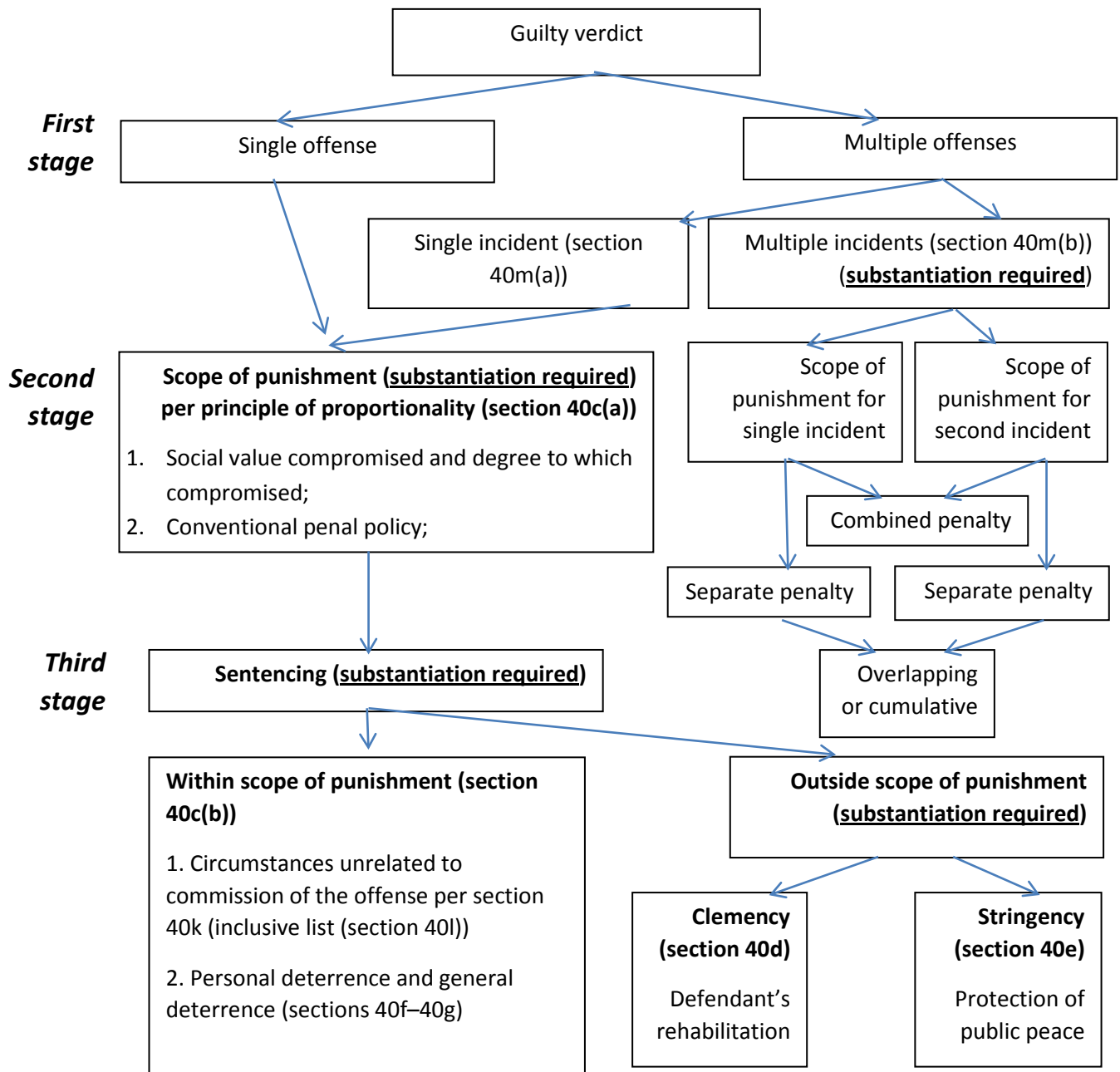
Further, as discussed above, under the principle of legality, “nothing constitutes an offense and there is no penalty for it, unless it is so prescribed by law or under it” (PL, section 1; Feller, 2000, p. 9).

The principle of legality requires that the punishment for any concrete offense be expressly rooted in law and that its practical application be equitable, with no illegitimate discrimination related to the person committing the offense, and that every person be cautioned absolutely and in advance with regard to the punishment that awaits him for the offense in the event that he is convicted thereof. The application of this principle is assured by establishment of a maximum punishment for every type of offense, in accordance with its maximum possible severity. Society, through the agency of the legislator, is capable of gauging the severity of an offense and making this normative expression through punishment, while the fact that this is a maximum punishment permits it to be adapted to any offense committed even if the actual severity of that offense is lesser than the maximum. This project of individuating punishment in

accordance with the degree of severity associated with an actual offense is the province of the judicial authority, which is thus made responsible for giving the law expression, applying it, and doing justice in every given concrete circumstance in criminal law where a person is put to trial (Feller, 2000). The judicial authority *applies* the criminal law established by the legislator: it does not *create* criminal law. The principle of legality in criminal law forbids judicial legislation, in which judges make law.

In PL, Chapter VI, article 1a, the legislator established the form of judicial discretion in sentencing (hereinafter, *Article 1a*), with the purpose of establishing the principles and criteria to guide sentencing, the weight to be given them, and the relationship between them, so that the court will set the appropriate penalty for the guilty party in the circumstances of the offense (PL, section 40a), as demanded by the principle of legality. In Article 1a, PL entrenches the principles of sentencing that the judge must take into consideration and that he must balance against each other. The guiding principle of sentencing is assurance of an appropriate relationship between the severity of the offense, given its circumstances and the degree of the culpability of the accused, and the type and degree of the penalty decreed upon him (PL, section 40b).

Article 1a establishes a triphase sentencing mechanism. In the *first*, preliminary stage, the court is required to examine whether the accused before it has been convicted of a number of offenses, as opposed to a single count. In the *second* stage, the court establishes the appropriate scope of punishment, taking into account the nature of the offense and the circumstances attending its commission. Finally, in the *third* phase, circumstances unrelated to the offense are considered, and the court, while taking these into consideration, sentences the accused to a punishment within the scope of punishment established in the second phase, as follows:



**Figure G: The Triphase Sentencing Mechanism.**

(Source: CrimA 8641/12 *Sa'ad v. Israel State* (not reported) Aug. 5, 2013).

One might argue that the normative arrangement established in case-law by the courts and parole committees, according to which Sulha can, under certain circumstances, constitute a consideration in one's favor, is in practice judicial legislation that deviates from the principle of legality. Indeed, Sulha may be weighed as one of the other considerations bearing on sentencing, albeit it is listed neither among those

circumstances associated with the commission of the offense nor among those that are unrelated (PL, sections 40j, 40k), all in accordance with the provisions of section 40i of PL. However, in our view and in the interest of full application of the principle of legality in criminal law, it is preferable that the law establish explicitly, clearly, and definitively that Sulha is one of the criteria to guide sentencing in Israel, as well as its weight and the relationship between it and other sentencing considerations, all so that the court can establish the appropriate punishment for the defendant in the circumstances of the offense of which he has been convicted.

### **4.3. The Second Research Question**

The sources of the data gathered for the second research question consist of Interviews, a Delphi survey, and the researcher's professional experience and personal diary. The data gathered indicate that justice is not always achieved by the Israeli criminal process; most of the Israeli public thinks that the Israeli criminal process does not achieve speedy justice; most of the Israeli public lacks confidence in the Israeli criminal process; there is distortion of justice (erroneous rulings) in the Israeli criminal process; and the conviction rate in criminal cases is very high, with vanishingly few exonerations. It further emerges from the qualitative data gathered from the various sources that it would be possible to enhance the Israeli criminal process by, inter alia, incorporating the institution of Sulha within the criminal process ;incorporation of Sulha in the Israeli criminal process would enhance the Israeli criminal process by achieving speedy justice and reducing the caseload at the courts; and incorporation of Sulha in the Israeli criminal process would boost public confidence in the criminal process and judicial activity, preclude, to the extent possible, distortion of justice in the criminal process ,and achieve restorative justice, reconciliation, and installment of peace between the parties affected by the criminal act .It further emerges from the data gathered that the Sulha process in Israel contributes greatly to reconciliation and installment of peace in Israeli society and achieves restorative justice, and that the Israeli public accepts and is satisfied with it.

#### **4.3.a. Sulha, Caseload Reduction at the Courts, and Achieving Speedy Justice**

Kenan et al. (2007) compare the caseload burden of judges (judicial burden) in Israel with that in sixteen other countries (Australia, England and Wales, Denmark, Norway,



Portugal, Cyprus, Italy, Belgium, the Netherlands, New Zealand, Finland, Sweden, Ireland, Germany, Spain, and France).

Based on their findings:

“Israel is ranked third in judicial burden among the seventeen countries included in the study, based on the criteria for counting court cases. In the level of legal activity (defined by the ratio of case number and population size) Israel is ranked first, while in the ratio of population and judges it is ranked sixth” (Kenan et al., 2007, p. 38).

The researcher would argue that incorporation of Sulha in the Israeli criminal process would reduce the caseload burden at the courts, which in turn would enhance the quality of judicial activity and availability of speedy justice.

#### **4.3.b. Sulha and Public Confidence in the Israeli Criminal Process and Judicial Activity**

The most precious possession of democratic society, the judicial authority, and the criminal process is public confidence in them (Barak, 2009). Lack of public confidence hurts judges, society, and the nation (*Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833, 868 (1992)).

Public confidence in the judicial authority and judges necessitates that the judicial authority deliver justice in accordance with the law and that judicial activity be conducted in a manner that is fair, professional, and neutral and does not show preference to either party (HCJ 5364/94 *Velner v. Head of Israeli Labor Party*, IsrLR 1 [1994] 758, 809).

The need to assure public confidence in the judicial authority, judges, and the judicial system in general is a continuing need. The public consists of the entire nation, both majority and minority. The public, through the agency of the political authorities, always can adapt justice to a new social reality. Justice ought to be adapted to the changing human-social needs of life (Cardozo, 2000).

The Israeli public correctly believes that public confidence in the criminal process is an important and crucial condition, and in fact is the only guarantor of a sustained, just legal system and criminal process in a democratic state.

As noted, the data gathered indicate that the Israeli public is interested in incorporation of Sulha in the Israeli criminal process. Adaptation of the criminal process and the existing social reality according to the wishes of the public would have the additional effect of increasing public confidence in society, the judicial authority, judges, the legal system in general, and the criminal process in particular.

#### **4.3.c. Sulha and Minimizing Distortion of Justice in the Israeli Criminal Process**

Over the course of a number of years ending in 2008, the Central Bureau of Statistics of Israel (hereinafter, *CBS*) reported that the rate of exoneration in Israeli criminal law amounted to one per mill (0.1%; CBS, 2008, p. 491)—which is to say that only one defendant of every thousand was exonerated. In 2010, the CBS published data according to which the rate of exoneration was slightly more than one percent (CBS, 2010, p. 493).

Research also was conducted regarding the judicial decision-making process in criminal affairs, resulting in the finding that judicial decisions were influenced by extra-legal considerations foreign to the criminal process, such as the ethnicity, race, skin color, etc. of the defendant, the judge, and the victim. It has been argued in many studies that the Israeli legal system discriminates adversely between the Jewish majority and the non-Jewish minority, as well as between various ethnic and racial groups (Relener, 1999; Rattner and Fishman, 1998; Fishman et al., 1987; Gazal et al., 2009; Kraminzer et al., 1993; Haj-Yihia et al., 1994; Regev, 2004; Serhan and Elias, 2013).

The aforementioned studies indicate that Arab defendants experienced adverse discrimination relative to Jewish defendants in all stages of the criminal process: Investigation, detention, conviction, and sentencing, including severity of punishment. There is stereotypically adverse discriminatory treatment of the Arab population of Israel.

Another study indicates that sentences meted out to non-Jewish defendants were more severe than those handed down to Jewish defendants, which is shown to be a function of the place of judgment and the court hearing a given case (Kraminzer et al., 1988).

Fishman et al. (2007) similarly examined the influence of judges' ethnic origins on the criminal process. The researchers focused on the sentences handed down by district courts in the Haifa District and the Northern District. The study examined the influence

of the ethnic origin of the defendant, the judge, and the victim on the sentences given. The sample included 3,229 cases of severe violence heard by the Haifa district courts and Nazareth district court. The study's findings indicated that Arab defendants were more likely to receive prison sentences than Jewish defendants, both from Arab judges and from Jewish judges. Arab judges treated Jewish defendants leniently, while Arab defendants were less likely to receive terms of imprisonment when judged by Jewish judges and more likely to do so when brought before Arab judges. Conversely, Jewish defendants were treated leniently by both Arab and Jewish judges. Jewish judges treated Jewish defendants more leniently than they did Arab defendants, while Jewish defendants always were less likely to receive prison terms than were Arab defendants where the judge was of Jewish origin. The findings of the aforementioned study further showed that in cases that came before Arab judges, the ethnic origin of the victim influenced the sentence given. Arab judges were more lenient toward defendants when the victim was of Arab origin, as opposed to Jewish origin, regardless of the ethnic origin of the defendant. Arab judges dealt more harshly with Arab defendants when the victim was Jewish and dealt more leniently with defendants when the victim was an Arab.

Gazal et al. (2009) argue that the decision concerning the release of a given suspect from detention is dependent on the ethnic identity of the suspect and the judge, such that a Jewish suspect is more likely to be released from detention when the judge is Jewish than is an Arab suspect in similar circumstances. Further, when the judge was Arab, an insignificant disparity was found indicating that an Arab suspect was more likely to be released from detention than was a Jewish suspect. Serhan et al. (2013) argued that the findings of their study of 518 rulings of Israeli courts show that Arab judges are more lenient in sentencing Arab defendants convicted of being present in Israel illegally than are Jewish judges.

Danziger et al. (2011) similarly argue that meal breaks taken by Israeli parole boards influence the board's decision, and the parole decisions are influenced by legally irrelevant situational determinants.

Thus the findings of the present study, which point to the existence of distortion of justice and inequality in the criminal process, as well as an extremely low rate of exoneration in criminal affairs and failure to extend due process to criminal defendants,

accord with the findings of many other studies that have examined judicial decision-making in Israeli criminal proceedings.

I argue that the incorporation of Sulha in the Israeli criminal process would enhance the criminal process; prevent, to the extent possible, distortion of justice and inequality in the Israeli criminal process; and guarantee the criminal defendant's right to due process.

#### **4.3.d. Sulha and the Victimology, ADR and RJ Schools in the Criminal Process**

Based on the data gathered in the context of this study, Sulha should be incorporated in the Israeli criminal process, and this would enhance the criminal process by delivering speedy justice, preventing distortion of justice, and enhancing public confidence in the legal system in general and the Israeli criminal process in particular. The data gathered in this study further indicate that the Sulha process achieves restorative justice and engenders reconciliation and peace in society. The findings of the study find support in the ADR, RJ, and Victimology schools of thought. The ADR school of thought proposes a spectrum of alternative conflict settlement processes in all fields of law, corresponding to its approach of giving responsibility to all individuals in society, addressing itself to the relationships between them and reducing bureaucracy (Sander, 1985; Merroni, 1999).

According to the Victimology school of thought, the status of the victim of an offense should be enhanced so that he is an active participant in the criminal process (Prittwitz, 1999; Schunemann, 1999). A guarantee of payment of damages to the victim of the offense in effect constitutes recognition of the victim in the criminal process and greatly enhances his material and emotional condition. The institution of payment of damages to the victim is of ancient origin and even today is practiced in many of the world's legal systems (Dubber, 1999).

Both the ADR School and that of Victimology influenced the development of the RJ school and have directly impacted on the criminal mediation process. The ADR School shaped the mediation process and enhanced it as practiced in all fields of law, while the Victimology movement paved the way for integration of the victim of the offense in the criminal process. At the foundation of our personal, national, cultural, and international lives lies consent. Consensual settlement of a conflict is the sole and most fitting guarantee of human coexistence. In human life, conflicts arise. Consensual settlement of these conflicts is inherent to the nature of human existence. That human society which

best realizes human existence is that which is based on social consent, as the foundation of its existence, the basis of its continued development and growth, and the solution for conflicts that emerge within it (Merroni, 1999; Barak, 2002). Of consensual settlement of a conflict and settlement by coercion, consensual settlement is to be preferred (Cloke, 2001).

In our view, Sulha is consistent with the ideology of the ADR, Victimology and RJ schools of thought and realizes their goals and principles.

#### **4.4. Additional Justifications for Incorporation of the Sulha in the Israeli Criminal Process**

We would argue that there are still other justifications—philosophical, normative, and positivist—for incorporation of the Sulha in the Israeli criminal process, arising from various contexts including the democratic-liberal model of the state, constitutional law, the economic theory of law, and comparative law.

The State of Israel is defined as a liberal and democratic state founded on a social contract between its citizens that stresses the constitutional principles of liberty, equality, justice, and peace (DESI section 3; HCJ 73/53 *Kol ha-Am*, *ibid*, 884; BLHDL, section.1).

Political liberalism placed the individual in the center of political thought and contraposed the individual to society. Liberal political philosophy gave form to the liberal legal approach to modern criminal law, i.e. legal individualism, which is concerned with the rights of the human being. Legal individualism—not the principle of legal social control—is the rule. Legal social control has become an *inescapable limitation* on legal individualism, required to facilitate healthy social life within organized human society (Hallevy, 2009).

According to modern legal individualism, the offense is, first and foremost, an expression of conflict between the offender and the victim, and realization of criminal liability is an interest of the offender, the victim, and the community, rather than the state alone. In accepting the social contract, the individual did not waive his right, power, or ability to resolve a conflict resulting from a criminal offense independently and through private arrangement. The Sulha process thus is consistent with the principles of democracy and the modern liberal democracy. Sulha, as a process for the

settlement of conflicts in criminal law, gives optimal expression to the human freedom of a person in a liberal democracy.

The 1992 passage of basic laws, BLFO and BLHDL, brought about the constitutionalization of Israeli law in general and Israeli criminal law in particular (Barak, 1996).

Law in general and criminal law in particular now are derived from human rights. The victim has an important place in Israeli criminal law, both fundamental and procedural. In a number of offenses (PL, sections 345, 348, 368, 278–382, 383, 393–402, 413(b), 413(d), 413(h), 413(k), 427, 428, 430, 447), the victim's non-consent is what creates a criminal offense.

Further, in most of these cases it is the consent of the victim that precludes criminal process *de facto*. In the absence of a complaint by the victim to the investigative authority (the police), no criminal process will be initiated against the offender. The victim of the offense also is a key witness, and the legislator gave recognition to the victim's centrality in criminal law with the passage of the Crime Victims Law - 2001. There is also an alternative process in criminal law for juvenile defendants (YJPTL, section 12(a)). The victim's importance extends to the sentencing process. In sex crimes, the court is authorized to request a report on the victim of the offense (CPL, sections 68–73). In the detention process, too, the court is authorized to request a detention report that considers the personal circumstances of the victim of the offense (CPLEPA, section 21).

I argue that the offense creates a conflict between the offender, on the one hand, and the victim and community, on the other. The conflict gives rise to rights and duties. The right of the parties to a criminal offense, particularly the offender and the victim, to settle the conflict between them in a serious and consensual manner is a *positive constitutional right* derived from personal autonomy, the right to dignity, the right to personal liberty, the right to protection of life and bodily integrity, the right to privacy and personal modesty, and the right to property, and these must be respected. The Sulha serves to realize constitutional human rights. Its incorporation in the Israeli criminal process would enhance that process and preserve constitutional human rights.

Further, economics is “the science of choice under conditions of scarcity” (Posner, 2011). Incorporation of Sulha in the criminal process would rationalize the criminal justice system by reducing the caseload at the courts and offering an optimal solution to

the conflict resulting from the offense. It encourages confession by defendants and reduces the cost of crime. It maximizes aggregate utility to society. It maximizes aggregate happiness and aggregate wealth. Sulha is normatively justifiable by virtue of its reflecting the consent of all individuals affected by the offense (Salzberger, 1993).

Finally, criminal mediation is recognized by many of the world's legal systems. The main component of criminal mediation agreements is monetary compensation of the victim by the offender. In the United States, models of communal criminal conciliation and VOM have been developed. By the end of the final decade of the last century, there were nearly 300 criminal mediation programs in the United States (CFRJP, 1994).

In the 1980s, various European states began implementing mediation processes in criminal affairs. The Council of Europe went so far as to entrench such a process in criminal law in the member states of the European Union. In 1999, the European Forum for Victim–Offender Mediation and Restorative Justice (EFVOMRJ) was founded (EFVOMRJ, 2000).

In Germany and Austria, a mediation process was set down in law for application in certain criminal contexts (Rossner, 1999; Frehsee, 1999).

The criminal mediation process was adopted by institutions of the United Nations (Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN) 1985; Development and Implementation of Mediation and Restorative Justice: Measures in Criminal Justice (UN) 1999; Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (UN) 2000).

#### **4.5. Arguments against incorporation of Sulha in the Israeli Criminal Process**

Fiss (1984, p. 1075) opposed the use of ADR in conflict settlement as a substitute for judgment, arguing:

“I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice

may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.”

I argue that the Fiss critique is neither relevant nor valid regarding the matter at hand, viz. the model put forward in the present study for incorporation of the Sulha in the Israeli criminal process. Fiss’ criticism is based on the assumption that settlement is *parallel* to or *in lieu* of judgment, which is not the case here. Under our proposal, the Sulha would be *incorporated* in the Israeli criminal process, i.e. the Sulha would be an inherent part of the criminal process rather than *supplant* it. Justice thus retains its relevance, fulfilling the capacity of regulating, overseeing, and enforcing the Sulha.

To be sure, several scholars have criticized settlement by criminal mediation while arguing that criminal mediation inherently compromises the purpose and aims of criminal justice; it goes against the philosophical dogma of punishment, including public shaming of the offender, general deterrence, prevention, and isolation of the offender from the public; criminal mediation does violence to the fundamental principle in criminal law under which realization of criminal culpability is the exclusive interest of the sovereign/state; it focuses on the victim of the offense rather than on the offender, thus intermixing tort law with criminal law; and it fails to contend with the in balance in the power of the parties to the offense, instead assuming a priori equality between their respective power and in some cases compromising the rights of the offender (Ashworth, 1993; Brown, 1994; Frehsee, 1999; Rossner, 1999).

In my view, the criticism of the aforementioned scholars is not relevant to the model proposed in this study for incorporation of the Sulha in the Israeli criminal process. First, the Sulha process includes public shaming pursuant to the criminal act. Further, the Sulha brings about general deterrence. *Diya*, moreover, includes penal damages. There is a subjective promise by the offender as well as a collective promise by the members of his family to see to it that the offender’s criminal behavioral patterns are altered and the offense is not repeated. The Sulha helps the victim and the offender to rehabilitate themselves quite quickly and to reintegrate in society, thus very greatly reducing delinquency and crime.

The rights and duties of the victim, the offender, and the community resulting from the criminal offense in effect are rights and duties of the victim and the offender, rather than of the state/sovereign. The state is the trustee of the public, and realization of criminal



culpability through its agency does not dispossess the parties to the offense of their rights and duties. The liberal democracy must provide optimal protection for human rights, including the rights of the victim of the offense and of the offender. In any event, under the model proposed in the present study, the Sulha would be an inherent part of the Israeli criminal process and not void the traditional criminal process. The Israeli public, which is the sovereign, is interested in incorporation of the Sulha in the criminal process and is satisfied with the Sulha process.

Tzafrir (2006) argues that the Sulha Institution is part of the customary Arab law that belongs to the civil private law sector and not the criminal law is not correct. Tzafrir examined a number of Sulha agreements that were examined by the Israeli courts. This study and its conclusions are different. In this study and its conclusions, the Sulha Institution will be incorporated into the Israeli criminal procedure. The study focuses on the incorporation of the Sulha institution into the Israeli criminal procedure, where the procedure is carried out in accordance with the provisions of the law by qualified J'aha who appointed by the State. The procedure is done with the full consent of those involved: the offender, the victim of the offense and the community. If the process is successful, a valid and binding Sulha agreement will be signed. There will be no defects in the process of making and signing the agreement, such as fraud, coercion, oppression, deception, and the like. The Sulha agreement also requires the approval of the court, and will meet the needs, interests and rights of all those who were affected by the offense: the offender, the victim of the offense and the community.

#### **4.6. The Third Research Question**

It emerges from the qualitative data gathered from the admissible, relevant, and credible sources that the Sulha ought to be incorporated in the Israeli criminal process. The Sulha neither *voids* nor *parallels* the criminal process, but is incorporated within it. The Sulha process ought to be granted legal status and incorporated in the criminal process. Further, the Sulha process ought to be adapted to the social and legal reality of a liberal democracy. Professional, objective Sulha Council (*jaha*) members who have legal education and are respected by society should be appointed to the council. Incorporation of the Sulha in the Israeli criminal process must be through *legislation by the legislator*, rather than a result of judicial decisions. A bill has been prepared reflecting the preceding.

Judicial rulings are not recognized by Israeli law as a legitimate normative source for the creation of a criminal norm or introduction of new arrangements to general penal law (Hallevy, 2009; LCrimA 53/54 *Eshed v. GA*, IsrLR 1 [1954] 785, 818–819).

Creation by the court of new arrangements in general penal law violates the principle of legality (Hallevy, 2009). Incorporation of the Sulha in the criminal process thus is to be done by the legislator through enactment of special legislation, rather than by judicial legislation. The same is indicated by the data gathered in the study and by the proposed law draft.

Appointment of objective, professional Sulha Council members who have legal education and are respected by society would guarantee that the Sulha process be lawful, objective, neutral, and efficient, as well as provide optimum protection for the rights of those involved with the criminal act: the victim, the offender, and the community.

According to the data gathered, the Sulha process ought to be incorporated in all stages of the Israeli criminal process: the investigative stage prior to indictment, the stage following indictment, that of sentencing (establishing a punishment), and the stage of conditional release from imprisonment. The Sulha process is to be entrenched in a procedure whose details are established by the Minister of Interior with the consent of the Minister of Justice, to include, inter alia, considerations, conditions, and arrangements for diverting an offender to a Sulha process; threshold conditions for conducting the process; and provisions concerning the Sulha Council. I argue that under the model proposed in the present study (the law draft), incorporation of the Sulha in the Israeli criminal process would permit implementation of a range of techniques and solutions more varied, optimal, and just toward the offender, the victim of the offense, and the community. The adoption of such measures would strengthen society, the state, and the Israeli legal system, as well as powerfully buttress the values of justice, truth, and peace. It is derived from the legal individualism of criminal law and is in keeping with the principles and fundamentals of the modern liberal democracy.

#### **4.7.Summary**

In this chapter we have sought to make sense and meaning from the qualitative data gathered over the course of the study in reference to the research questions. The data collected show that criminal statutory laws do not recognize the institution of Sulha as

an alternative conflict settlement process to the existing Israeli criminal process. Israeli courts, too, do not recognize the institution of Sulha as an *alternative* to the criminal process. There are two competing schools of thought among Israeli judges with regard to the legal status of the Sulha in the criminal process. *One school* champions the traditional paradigm of criminal justice and refuses to grant the institution of Sulha any binding legal status in the Israeli criminal process. *Another school*, which today is the dominant one of the two, is of the view that the Sulha can serve as a consideration in favor of an individual under investigation, detainee, defendant, or prisoner, but is not a decisive consideration and certainly not one that binds the courts or parole committees. The current Israeli criminal process is not as it ought to be. It does violence to justice, to the right to equality before the law (particularly the principle of uniformity of punishment), to the right to due process in criminal matters, and especially to the principle of legality in criminal law.

Further, it emerges from the qualitative data gathered that the current Israeli criminal process does not always achieve justice. Most of the Israeli public is of the opinion that the Israeli criminal process does not deliver speedy justice, it suffers from distortion of justice, the conviction rate in criminal cases is very high, and there are vanishingly few exonerations, and most of the Israeli public lacks confidence in the criminal process. The qualitative data gathered also indicate that it is possible to enhance the Israeli criminal process by, inter alia, incorporating the Sulha in the Israeli criminal process, and that incorporation of the Sulha process in the criminal process would enhance the criminal process in terms of achieving justice; reducing the caseload burden at the courts; preventing, to the extent possible, distortion of justice; achieving restorative justice, bringing about reconciliation, and instilling peace in society; and buttressing public confidence in the legal system, the judicial authority, and the criminal process.

According to the qualitative and reliable data collected in this study, the Israeli public, which enjoys sovereignty in the Israeli state, is highly satisfied with the Sulha process and is interested in the incorporation of the Sulha in the Israeli criminal process.

This study demonstrated through the examination of the data collected that the Sulha may be incorporated in the Israeli criminal process. A law draft (Appendix F) was offered for incorporation of the Sulha in the Israeli criminal law. Sulha will be part of Israeli penal law. Israel's penal laws apply to any offense committed by an Israeli (Jews, Arab Muslims, Christian Arabs, Druze, Circassian, Bedouin, etc.) within Israel (PL,

section 7). Therefore, the Sulha applies to every Israeli as aforesaid. Sulha is a traditional and ancient procedure for resolving criminal disputes. It is also a kind of restorative justice. It is a technique of restorative justice for the resolution of criminal disputes.

This study also proposes a new theory and model of the Israeli criminal process and offered a law draft to incorporate the Sulha within Israeli criminal law (Appendix F).

The arguments against ADR and against settlement in criminal matters are neither admissible nor valid in the debate for or against the adoption of the model proposed in the present study for incorporation of the Sulha in the Israeli criminal process.

Finally, the qualitative data gathered show that the incorporation of the Sulha in the Israeli criminal process must be done through *legislation* by the legislator, rather than come into being as a law created by the judiciary.

This is required by the principle of legality in criminal law, and a special law draft has been prepared accordingly. Incorporation of the Sulha in the criminal process, as proposed by the law draft, would permit implementation of a range of techniques and solutions more varied, optimal, and just toward the offender, the victim, and the community, which would strengthen society, the state, the legal system, and the criminal process, as well as powerfully buttress the values of justice, truth, and peace. It is derived from the legal individualism of criminal law and is in keeping with the principles and fundamentals of the liberal democracy.

## **Chapter Five: Conclusions**

### **5.1. Introduction**

The present study investigated the legal status of the Sulha in the criminal law of the State of Israel. The study focused on collection, analysis, and interpretation of data pertaining to the Sulha across all stages of the Israeli criminal process, from the stage of investigation to indictment, determination of guilt by the court, appeal, and finally conditional release by a parole commission. The scope of the study was limited to the legal status of the Sulha in Israeli criminal law as it relates to statutory laws regulating criminal justice; verdicts and other decisions rendered by the various courts (supreme, district, and magistrate) during the years 1990–2014; and parole commission decisions published on the website of the Judicial Authority ([www.court.gov.il](http://www.court.gov.il)).

This WBP is a qualitative exploratory single case study. The study was exploratory in nature. Its main objective was to describe and explain the legal status of the Sulha in Israeli criminal law and thus to create scientific and professional knowledge with practical ramifications for the judicial world, as well as to develop a new theory and model of the Israeli criminal process that would allow for incorporation of the Sulha within it.

This qualitative exploratory study is the first effort at academic and professional research into the matter at hand. In accordance with the research paradigm, discussed in section 3.6, this study employed the interpretative epistemological approach.

In keeping with Yin's case study process, research was conducted in six crucial, linear, and interdependent stages: plan, design, prepare, collect, analyze, and share.

### **5. 2. Research Objectives**

The study was planned, designed, and conducted to meet the following overall and specific research objectives:

#### **Overall Objectives**

1. To explore and assess the legal status of the Sulha in Israeli criminal law;
2. To assess the possibility of incorporating the Sulha in Israeli criminal law, as well the requisite conditions for such a development;

3. To propose a new theory and model of the Israeli criminal process and draft a legislative proposal to incorporate the Sulha within Israeli criminal law.

#### Specific Objectives

1. To improve and strengthen the central elements of the Israeli criminal justice system, e.g. the principle of equality before the law and uniformity of punishment, constitutionality in criminal law, the right to due process, keeping miscarriages of justice to a minimum, buttressing public confidence in judges and in the judicial authority, strengthening justice, and so forth;
2. To identify the factors contributing to the decline in public confidence in the Israeli criminal justice system, and examine potential means of buttressing public confidence therein;
3. To reduce judicial burden and decrease the number of pending cases, thus improving judges' work as well as the functioning of the judicial system;
4. To effect a change in the Israeli criminal justice system specifically, and in general to strengthen Israeli democracy and the doctrine of restorative justice in criminal law, thus furthering the causes of justice, truth, and peace;
5. To initiate a dialogue with professionals in the field of criminal justice in Israel and abroad;
6. Finally, the personal aim of the present study: to enrich the researcher's professional knowledge; reduce his professional workload; and improve the state of his workplace, viz. the courthouse.

As noted, the first objective of the study was to explore and assess the legal status of the Sulha in the criminal law of the State of Israel, inclusive of both statutes pertaining to criminal law and rulings handed down by the courts in criminal cases. The researcher believes that this objective was met in its entirety. The study examined the three relevant, admissible, and reliable legal sources, namely:

1. Official legal documents, such as statutory laws regulating criminal justice, viz. CPLEPA, CPL, PL, JLJPT, CRFPL, BLPS, and CL; rulings and other

decisions of the courts (magistrate, district, and supreme); and decisions of various parole commissions;

2. The professional literature;
3. The researcher's professional experience.

The admissible and reliable findings obtained during the study demonstrate that the statutory laws regulating Israeli criminal law do not recognize the Sulha as an alternative conflict settlement mechanism process in Israeli criminal law.

Five hundred and ninety (590) verdicts and decisions handed down by various Israeli courts (magistrate, district, and supreme) during the years 1990–2014 were examined. The findings demonstrated that Israeli courts, as reflected in their rulings in criminal cases, do not recognize the Sulha as an alternative process to the current criminal process, as well as that there are two principal approaches (schools of thought) to the question of the legal status of the institution of Sulha in Israeli criminal law. One approach champions the paradigm of traditional formal criminal justice, refusing to grant the institution of Sulha any binding legal status in Israeli criminal law, while according to the other approach—which today is dominant among judges on all courts and most parole committees—the Sulha can serve as a consideration in a person's favor, whether with regard to detention, punishment, or conditional release, but not as a decisive consideration, and certainly not as one that binds the courts or parole committees, whether at the time of detention, in sentencing, or at the point of rendering a decision regarding conditional release of the prisoner. These findings corroborate those previously reported in Hlahel (2002), Shapiro (2006) and CrimR (zef) 2259/03 ad loc.

Seventy-six parole commission decisions published on the website of the Judicial Authority also were examined. The study demonstrates that parole commissions too manifested two approaches to the Sulha. According to the first, the Sulha is one of the various considerations that the commission is to take into account in issuing a decision concerning a prisoner's conditional release from imprisonment. According to the second, the Sulha is not a relevant consideration. These findings corroborate those previously reported in Hlahel (2002) and by CrimP 2259/03 ad loc.

The second objective of the study also was fully met. The admissible and reliable findings obtained during the study demonstrate that Israeli criminal justice in its present form fails to achieve its purpose, namely discovering the truth, doing justice, convicting the guilty party, and exonerating the innocent.

The findings of the study indicate that justice is not in practice achieved by the Israeli criminal process; most of the Israeli public believes that the Israeli criminal process does not achieve speedy justice; most of the Israeli public lacks confidence in the Israeli criminal process; there is distortion of justice (erroneous rulings) in the Israeli criminal process; and the conviction rate in criminal cases is very high, with vanishingly few exonerations. What is more, there is discrimination in Israeli criminal law between the Jewish majority and the Arab minority, with adverse discrimination suffered by the latter. These findings corroborate those previously reported in CBS (2010), Rattner (1999), Rattner and Fishman (1998), Regev (2004), Fishman et al. (1987), Gazal et al. (2009) Kraminzer et al. (1993), Haj-Yahia et al. (1994), Serhan and Elias (2013) and Kenan et al. (2007).

The study's findings further demonstrate that the paradigm of Israeli criminal law in general and the Israeli criminal process specifically should be improved, inter alia, by incorporation of the institution of the Sulha within the criminal process. Such a development would enhance the Israeli criminal process by achieving speedy justice; reducing the caseload of the courts; boosting public confidence in the criminal process and judicial activity; precluding, to the extent possible, distortion of justice in the criminal process; and achieving restorative justice, reconciliation, and installment of peace between the parties affected by the criminal act. It further emerges from the data gathered that the Sulha process in Israel contributes greatly to reconciliation and installment of peace in Israeli society and achieves restorative justice, as well as that the Israeli public accepts and is satisfied with it. These findings corroborate those previously reported in Hlahel (2002), Shapiro (2006), Jabour (1996) and Farkash (2002).

The third objective of the study was to propose a new theory and model of the Israeli criminal process and draft a legislative proposal to incorporate the Sulha within Israeli criminal law. This objective too was fully achieved. A proposal for the amendment of CPL was drawn up mandating the incorporation of the Sulha within Israeli criminal law (**Appendix F**).



The admissible and reliable findings obtained during the study demonstrate that incorporation of the Sulha in the criminal process of the State of Israel as mandated in the aforementioned draft legislation would achieve specific objectives 1, 2, 3, and 4, delineated above, as well.

The draft legislation seeks to incorporate the Sulha process in all stages of the Israeli criminal process: the investigative stage prior to indictment, the stage following indictment, that of sentencing (establishing a punishment), and the stage of conditional release from imprisonment under a parole commission decision.

It is proposed that the Sulha process be entrenched in a procedure whose details are to be established by the Minister of Public Security with the consent of the Minister of Justice and are to include, inter alia, considerations, conditions, and arrangements for diverting an offender to a Sulha process; threshold conditions for conducting the process; and provisions concerning the Sulha Council.

At the core of the bill is an attempt to confront the offender in an appropriate alternative manner, based on the assumption that the formal criminal process in Israel is not always an appropriate and just solution for all of the actors involved (the offender, the victim of the offense, and the community or society). In recent years, the status of the victim of the offense has become continually greater in the criminal process, and alternatives to the criminal process, such as criminal mediation, have developed. Some time ago, the JLJPT was passed. In 2006, the PL was amended and a procedure—the criminal mediation process—was set for preliminary hearings (section 143a of the PL).

Moreover, as of 2012 there is an alternative to the criminal process for minors involved in criminal acts (section 12a of the JLJPT).

The dominant philosophical and legal view today is that the victim of the offense is a party to the criminal process and the criminal process should be settled in accordance with the restorative justice model, whose purpose is optimal restoration of the injuries caused by the criminal act, including all of its human consequences. The Sulha, which is based upon the restorative justice model, is not entrenched in Israeli legislation despite the fact that the courts and parole commissions in Israel have established in a great number of decisions that it is a component of the criminal process and constitutes one of the considerations to be weighed concerning detention, punishment, and conditional release from prison.

A recently completed academic study demonstrated that the majority of the public is interested in the incorporation of the Sulha in the Israeli criminal process. There is no doubt that incorporation of the Sulha in the criminal process, in accordance with a procedure to be established by the Minister of Public Security with the consent of the Minister of Justice—the present proposal—is constitutional, promotes exercise of human rights, and accords with the idea of liberal-constitutional democracy. It maximizes the aggregate social benefit and reduces the cost of the response to criminal acts.

This approach has historical and social roots: it is supported by the majority of the public and modern schools of thought on the criminal process, e.g. restorative justice, ADR, abolitionism, communitarianism, and the victims' school.

In practice, the Sulha today is brought to bear in the criminal process with regard to detention, punishment, and conditional release from prison in appropriate instances and under the conditions that have been established by the courts and parole commissions.

The present proposal also will strengthen public confidence in the legal system and in judges. It will decrease the caseload of the courts; improve the work of judges; and serve the cause of justice, which is the purpose of law.

Incorporation of the Sulha in the Israeli criminal process would facilitate implementation of various better-suited and more just techniques and solutions for the criminal act, thus strengthening society and the legal system and powerfully buttressing the three pillars of the world: justice, truth, and peace.

The sixth of the study's specific objectives also was achieved, through publication of the study in conferences, seminars, and workshops attended by academics and professionals in the field. The study was presented at the fourteenth conference of the Israel Bar Association, and feedback was positive (**Appendix G**). Additional information concerning publication of the study appears in Chapter 6: Dissemination Strategies.

Notably, the study made a particularly significant contribution to the researcher's professional and scientific knowledge. Passage of the draft legislation and incorporation of the Sulha in the criminal law of the State of Israel would dramatically improve the researcher's work in court.

### 5.3. Conclusion

The present study examined the legal status of the Sulha in Israeli criminal law (both substantive and procedural) across all of its stages: investigation, indictment, determination of guilt, appeal, and conditional release.

This WBP is a qualitative exploratory single case study, and was conducted in six crucial, linear, and interdependent stages: plan, design, prepare, collect, analyze, and share.

The study very successfully achieved its goals and objectives. It investigated, described, and defined the legal status of the Sulha in the criminal law of the State of Israel; demonstrated through examination that the Sulha may be incorporated in the Israeli criminal process; and offered a legislative proposal for incorporation of the Sulha therein. It further demonstrated that implementation of the findings of the study—most especially the passage of the legislative proposal and the incorporation of the Sulha in the criminal law of the State of Israel—would improve and strengthen implementation of the principles, objectives, goals, and policies of Israeli criminal law, viz. equality before the law, performance of justice (i.e. conviction of the guilty party and exoneration of the innocent), uniformity of punishment, constitutionality in criminal law, the right to due process, keeping miscarriages of justice (erroneous rulings) to a minimum, improving and buttressing public confidence in judges and in the judicial authority, strengthening justice, and so forth. So too, the researcher sincerely believes that incorporation of the Sulha in Israeli criminal law would reduce the caseload borne by the courts and judges, thus improving the quality of judicial work.

The researcher also sincerely believes that incorporation of the Sulha in the criminal law of the State of Israel would improve and strengthen both substantive and constitutional democracy therein, buttress social solidarity in Israel, bolster the standing of the Arab minority, and implement the doctrine of restorative justice in criminal law.

Further, the study contributes greatly to the scientific, academic, and professional dialogue within the scientific and academic community; among professionals in the legal field (judges, prosecutors, defense counsels, social workers); and amid members of the ADR school. There is no doubt that the study enriched the researcher's scientific and professional knowledge and facilitated improvement of his work in court.

The researcher hopes that this study has made a contribution to the scientific and professional community in Israel and throughout the world and, more generally, to human society, and that it has strengthened and improved implementation of the fundamental principles of human society: truth, justice, and peace.

## Chapter Six: Dissemination strategies

### 6.1 – Preamble

The dissemination of research based findings (RBFs) is an integral part of the research process (Derntl, 2003). Research dissemination, usually happens at the end of the research process (Barnes et al. 2003; Walter et al., 2003). Dissemination makes research available and useful. It should be done in a way that the “transformative potential is available” (Davies, 2003, p.117).

Experience and academic and professional literature support the need for a philosophical or conceptual framework/plan for dissemination and utilization (Peat et al. 2002; Granger et al. 2001).

This chapter is focused on presenting the dissemination efforts which have already been made and on further plans on how to disseminate research based findings to a wide variety of audiences. The purpose of the research is to generate knowledge. The underlying reason to gain and then disseminate new research-based findings knowledge is to assure it is appropriately considered in reaching decisions, making changes, or taking other specific actions designed to improve outcomes. So, one of the leading goals of dissemination is utilization (Granger et al., 2001; Harmsworth and Turpin, 2000; Brodie, 2005; Zariski, 1997).

There are two categories of benefits derive from publishing my research: (a) the first- *subjective one* - the personal and professional benefits that I would drive and (b) the second - *objective one* - the benefits to audiences/users.

When I look at my benefits, I can count a few. Firstly and the most important and, actually, the leading personal benefit, is the sense of achievement and the personal autonomy fulfillment.

I would drive from seeing my research-based findings were published in specialized scientific and scholarly publications written and electronic at once. Secondly, since academic publishing demands high writing and communication skills, which are valuable in sort of settings, I expect to develop and improve in that direction as well. Thirdly, dissemination my research in scientific and scholarly publications, will

compliments, quite nicely, my curriculum vita, and advanced my academic career (Rowley et al., 2000).

In section 6.2, I will discuss reflectively the dissemination that has taken place and the further dissemination planned, Section 6.3 will identify and resolve ethical issues concerning dissemination. Finally, section 6.4 is the summary.

## **6.2 The dissemination that has taken place and the further dissemination planned**

Every year, a conference of the Israel Bar Association takes place. The number of attorneys who are members of the Israel Bar Association is more than eighty thousand, as of the end of 2017. The annual conference of the Bar Association is a very important public conference, both for the professional legal community, for the political community and for the public community in Israel. The conference is attended by thousands of people: attorneys, judges from all the courts (the magistrate courts, the district courts and the Supreme Court), politicians, public figure, members of parliament, academic researchers and ministers. The conference discusses current and important issues for Israeli society and the State of Israel in various fields, including Israeli law and the Israeli legal system.

At the 14th Conference of the Israel Bar Association, which took place in Eilat in May 2015, I participated at the invitation of the conference's president, Attorney Zaki Kamal.

Thousands of participants attended the conference, including hundreds of judges from all courts in Israel. Among the participants were the president of the Supreme Court (retired) and his wife.

During the conference, I presented, in full and comprehensive details, the research and its findings, including the proposed law draft (Appendix F).

The audience response was excellent. The members of the professional legal community (attorneys, judges, academic researchers, and journalists in the field of law) were excited and very satisfied with the research and its findings, as well as the proposal law draft to include the Sulha in Israeli criminal law. After I presented the research and its findings to the public, the president of the Supreme Court (retired) approached me and shook my hand and said, "The study is very interesting."

Of course, I was very excited and was very pleased with the audience response and their impact and with the compliment I received from the Supreme Court President (retired). On June 12, 2015, I received the letter from the President of the 14th Conference of the Israel Bar Association, Attorney Zaki Kamal, regarding the presentation of the research and its findings at the conference and the audience's response and impact (Appendix G).

### **Further dissemination planned**

The quality of research should be measured by a mount of scientific publication and by its transferability into policy or practice. We must encourage the development of a system of scholar communication and research dissemination built in the principle of *open access*. Science findings need to be better communicated. I do believe that knowledge is the property of all humankind and must exist in a frame of free access for all.

The academic community should provide better and faster access to information. Scientists and academic researchers have to learn that the end of a research activity is just the beginning of the dissemination and communication contest - and not the end. Academic research, done well, is worth disseminating (Estabrooks, 2001).

The channels and methods and rules of dissemination are many and varied, each with its own advantages and disadvantages (Walter et al., 2003; Saldana, 2003; Sandelowski, 1998; Keen et al., 2007; CRUE report, 2009; Lee, 2002; Sweeney, 2001; Kinn, 1999; Moloney and Gealy, 2003; Gealy, 2003; Fisher, 2004; Katz, 1997; Bery, 2004; Derntl, 2003; Finn et al., 2005; Day et al., 2006; Bery, 2004; Finn, 1999; OECD 1998; Gibbons et al., 1994; Houghton 2003).

The growing use of ICTs in research is having a fundamental impact on the way research is being conduct and is leading to the emerging of e-science (Sargent, 2002, p.12).

ICTs enable people, tools and information to be linked in way that reduce barriers of location, time, institution and discipline (Atkins et al., 2003). The key areas of ICT impact on researchers are in communication and collaboration, information search and access, and dissemination and publication (Sargent, 2002; Walsh et al., 2000; Chisenga, 1999).

The increasing use of ICT publication allows for changing patterns of scientific and scholarly Communication and discourse.

The Website has become an extremely important medium of research as a primary means of dissemination research finding through digital libraries and electronic documents such as e-journals, pre-print, e-book, e-print archives, Personal Web pages and online conference proceeding (Noruzi, 2004).

The transfer of e-publishing technology and online distribution of such journals can greatly increase visibility and enrich knowledge.

Scientific and scholarly publication gradually moves from print-on-paper to e-publishing and open access (Viothofer, 2005; Kinne, 1999).

Major differences between disciplines, fields and modes of research in respect to communication and collaboration, information search and access, and dissemination and publication (Houghton, 2003).

I will disseminate my research and its findings in different academic and professional journals dealing with law and appropriate dispute resolution (ADR). In Israel, there are quite a few academic and professional journals of law.

Harmsworth and Turpin (2000) noted that: "effective dissemination can be defined as that which engages the recipe in process whether it is one of increased awareness, understanding or commitment action".

I agree. Therefore, for my effective dissemination strategy, I will need to adopt multi stand approach.

For "Awareness" - those target audiences that don't require a detailed knowledge for my research but it is helpful for them my activities and outcomes, such as external audience - Media, ADR groups, Local and Central Government, Public -. While I was working on the research I presented my research topic, question and methodology, and got excellent feed-back from the ADR group, the Sulha committees and the General Public. In the future, I will give presentations in conferences and seminars.

For "Understanding" - those target audiences that I will need to target directly with my dissemination, such as Internal and Connected Stakeholders - Potential User - Judges,



Attorneys, J'aha Committee and Students; Suppliers - ADR institutes and Distributors public/private research institutes, Libraries, etc.

For "Action" - Those people that are in position to "influence" and "bring about change" within their organization, such as Policy Makers, Legislature, Ministry of Justice, and Judiciary. I will transfer my research findings, results and recommendations to them at the end of my project. Also I plan to publish my research in the Judicial Authority Web ( <http://www.court.gov.il>).

### **6.3 - Ethical issues concerning dissemination**

Usually, when we think of ethics, we think of rules for distinguishing between right and wrong, such as the golden rules: *"do unto others as you would have them do unto you"*, a code of professional conduct like the Hippocratic oath: *"First of all, do not harm"*, a wise aphorism like the sayings of Confusions, or a religious creed like the Ten Commandments: *"Thou Shall not kill..."* (Resnik, 2010).

"Research conduct is judged by the extent to which it is aligned to moral agency recognizing the principal of respect of persons" (Halasa, 2005).

The leading reasons why it is important to adhere to ethical norms in research are: First, norms -like prohibitions against fabricating, falsifying, or misrepresenting research data- promote the aims of research, such as knowledge, truth, and avoidance of error. Second, ethical standards promote the values that are essential to collaborative work, such as trust, accountability, mutual respect, honesty and fairness. Third, many of the ethical standards help to ensure that researchers can be held accountable to the public. Fourth, ethical norms in research also help to promote other important moral and social values such as human rights, animal welfare, compliance with the law, and health and safety (Resnik, 2010).

Ethical lapses in dissemination of research-based findings can significantly harm human subjects, the academic and scholarly community and the public. Shamoo and Resnik (2009) mentioned several ethical principals in research, such as honesty, objectivity, integrity, carefulness, openness, respect for intellectual property, confidentiality, responsible publication, responsible mentoring, respect for colleagues, social responsibility, non-discrimination, competence, legality, animal care and human subjects protection.

The purpose of my research is to gain new and valuable knowledge. I will disseminate my RBFs and offer them to large audiences of internal, external and connected audiences such as my colleagues, professionals, policy makers, lawyers, academic researchers, stakeholders, etc.

As a researcher, I am aware that integrity and trust are the hallmarks of the scientific discovery and dissemination process.

Being objective is critical to this process, because communicating one's research to the scientific and professional community is at the heart of what keep science and academic research alive. It's also the principal way that researchers make their reputations, get jobs and promotions, obtain sustained research support and are held accountable to the public (Ritter, 2001).

I keep in my mind the principle that **no harm be done!** to any one. Failure to consider the ethical issues around informed consent and the potential risks to those involved can be fatal (Morgan et al., 2001). And I will:

- Honestly, report data, methods, results and procedures, and publication status. Not falsify, misrepresent and fabricate data, and not deceive colleagues or the public (Iphofen et al., 2004)
- Strive to avoid bias in experimental design, data analysis, data interpretation, peer review and others aspects of research, where objectivity is expected or required.
- Act with integrity.
- Avoid careless errors and negligence.
- Share data, results, ideas, tools, resources, and be open to criticism and new ideas.
- Honor all forms of intellectual property.
- Protect confidential communications, such as personal records, secrets.

- Publish my research-based findings in order to advance research and scholarship, not to advance just my own career.
- Avoid duplicative publication without telling the editors.
- Avoid submitting the same paper to different journals without telling the editors.
- Respect my colleagues and treat them fairly.
- Promote social good and prevent or mitigate social harms through research, public education and advocacy.
- Avoid any kind of discrimination against colleagues.
- Take steps to promote competence in science as a whole.
- Know and obey relevant laws and institutional and governmental policies.
- Minimize harms and risks and maximize benefits, respect human rights and autonomy.
- Seek informed permission to publish my research.

#### **6.4. Summary**

Dissemination is a complex process, involving many disciplines and players within an organization. We can think about dissemination in three different ways: dissemination for awareness, for understanding and for action. Effective dissemination of knowledge strategy will most likely require that it satisfy all three in turn: utilization is the goal. Researchers need to use multiple methods and means to navigate their dissemination course.

Effective dissemination relies on using varied channels. It is important to match the complexity of the research with the right medium. Dissemination is not a one-time activity, but a process that involves a long-term relationship with audiences and partners.

I hope that my dissemination plan reflects the needs of the target audiences. It relies on appropriate methods and tools, language and information content level. The plan

incorporates various dissemination techniques such as written, electronic, print and verbal media.

The methods include summary documents; electronic dissemination within my organization (Judiciary website) to key informants outside it; conferences and seminars. Each method call for its own format and means of dissemination and includes both proactive and reactive channels.

The plan draws on existing capabilities, resources, relationship and network. It includes effective quality control mechanisms to ensure that the research findings are accurate, relevant, representative and timely.

A combination of direct and proxy indicators (quality, quantity and relevance) can provide an acceptable measure of a successful dissemination plan.

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### **Appendix A: Open- ended Questionnaire, translated to English**

1. The main goal of Criminal Law is justice. What do you think of the existing criminal procedure in Israel? Is justice achieved, and if so, in what ways? (Please elaborate):
2. What is the contribution of the existing criminal law procedure in Israel to the way that the citizen and society of Israel perceive justice?
3. What can be done in order to improve the existing criminal law procedure in Israel?
4. The main goal of the criminal law procedure is achieving efficient justice. Delayed justice is not justice. Is "efficient justice in criminal law procedures" achieved in Israel, and in what ways could it be achieved? (Please elaborate):
5. What is the contribution of efficient justice in the criminal law procedure in Israel, as it is perceived by the society and citizens of Israel?  
And how do you perceive it?
6. What can be improved in the existing criminal law procedure in Israel, in order to achieve efficient justice?
7. The public's trust in judges and the judiciary is the heart and soul of the judicial system in Israel. Does the Israeli public trust the existing criminal law procedure in Israel, and is it expressed? If not, what is the proof for that?
8. What is the contribution of the public's trust in the existing criminal law procedure in Israel, as it is perceived by the Israeli public?
9. What can be done in order to improve the public's trust in the existing Criminal law procedure in Israel?
10. Justice in the criminal law procedure means convicting the guilty and

acquitting the innocent. What is your opinion of the existing criminal law procedure in Israel regarding this issue?

11. Some claim that the criminal judicial procedure suffers from miscarriage of justice (flawed verdicts). How do you perceive it (please elaborate):
12. What is the contribution of the existing criminal law procedure in Israel, in preventing from miscarriage of justice (flawed verdicts), as it is perceived by society ?
13. What can be improved in the existing criminal law procedure in Israel in order to prevent miscarriage of justice?
14. The main goal of the Sulha procedure is restorative justice.  
What do you think of the Sulha procedure in Israel?  
Is justice achieved and in what ways?
15. What is the contribution of the Sulha procedure in Israel to restorative justice, as it is perceived by the society and public of Israel?
16. What can be done in order to improve the Sulha procedure in Israel?
17. A main goal of the Sulha is "restoring" damages through settling the conflict that emerges as a consequence of the felony, between the offender, the victim, and community. This goal is achieved when the parties affected by the felony come to an agreement. The restoration is manifested mainly by responding to the emotional, social and material needs of the victim, in ensuring the wealth and safety of the community and establishing its values, and the integration of the offender back into the community. Is this goal achieved in practice, through the Sulha procedure in Israel and in what ways?
18. What is the contribution of the Sulha procedure in Israel to restorative justice, as it is perceived by the society and public of Israel?
19. What can be done in order to improve the Sulha procedure in Israel?
20. An additional goal of the Sulha is reconciliation and making peace between

the parties affected by the criminal act. Are reconciliation and peace between the parties affected by the felony achieved in practice, through the Sulha procedure in Israel and in what ways? (please elaborate):

21. What is the contribution of the Sulha procedure in Israel, to reconciliation and making peace among the Israeli society?
22. What could be done in order to improve the Sulha procedure in Israel regard to reconciliation and making peace among the Israeli society?
23. What could I have asked and didn't, regarding this domain?

General Comments:

## **Appendix B: Delphi Panel Questionnaire**

1. Interviews were one of the means used to collect data in this study. Respondents were asked whether justice is in practice achieved by the criminal process. The vast majority of respondents answered that justice is not in practice achieved by the Israeli criminal process. Some responded that relative or partial justice is achieved. What is your opinion?
2. Respondents were asked to identify the contribution of the Israeli criminal process to justice, as perceived by Israeli society and the Israeli public. The vast majority of respondents answered that most of the Israeli public thinks that the Israeli criminal process does not achieve justice. What is your opinion (please indicate below)?
3. Respondents were asked whether speedy justice (as opposed to delayed justice) is achieved in the Israeli criminal process. All of the respondents answered that speedy justice is not achieved in the Israeli criminal process. What is your opinion?
4. Respondents were asked what might be done in order to improve the Israeli criminal process. Most respondents answered that the criminal justice system should be reinforced and professional judges, prosecutors, and investigators should be appointed. The vast majority of respondents also stated that alternative modes of conflict settlement—such as mediation, conciliation, and Sulha—should be incorporated in the Israeli criminal process. What is your opinion?
5. Respondents were asked what might be done in order to improve the Israeli criminal process so as to achieve speedy justice. The vast majority of respondents (fifteen of sixteen) answered that alternatives to criminal trial—such as mediation, conciliation, and Sulha—should be incorporated in the Israeli criminal process. Some respondents answered that the courts' caseload should be reduced; professional judges, prosecutors, and investigators should be appointed; and the criminal process and delivery of rulings should take place earlier, soon after commission of the crime. Some responded that the victim of an offense should be better integrated within the Israeli criminal process. What is your reaction?

6. Respondents were asked whether the Israeli public has confidence in the Israeli legal system. Most respondents answered that most of the Israeli public lacks confidence in the Israeli criminal process. What is your opinion?
7. Respondents were asked to identify the contribution of public confidence in the Israeli criminal process, as perceived by Israeli society and the Israeli public. The vast majority of respondents answered that public confidence in the Israeli criminal process is an important and crucial condition, and in practice the only guarantor of a sustained, just legal system and criminal process in a democratic state. What is your opinion (please indicate below)?
8. Respondents were asked what might be done in order to improve public confidence in the Israeli criminal process. All of the respondents answered that the Israeli criminal process should be rationalized and improved. According to the responses of the vast majority of respondents, rationalization and improvement of the criminal process would entail the following measures: curtailing the length of the criminal process; taking greater consideration of the rights of the victim of the offense; reduction of the courts' caseload; and incorporation of appropriate measures, such as mediation and Sulha, within criminal law. What is your opinion?
9. The respondents were asked whether distortion of justice occurs in the Israeli criminal process, in the sense that the guilty party is exonerated and the innocent party convicted. The vast majority of respondents answered that distortion of justice occurs in the Israeli criminal process, as well as that there are erroneous rulings. The conviction rate in criminal cases is very high and there are vanishingly few exonerations. What is your opinion?
10. Respondents were asked what might be done so as to improve the Israeli criminal process in order to prevent distortion of justice (erroneous rulings). The vast majority of respondents stated that the Israeli criminal process must be rationalized and improved in several ways: safeguarding the rights of the parties to the process, including those of the victim of the offense; reduction of the caseload; and implementing alternative approaches to trial, such as mediation and Sulha. What is your reaction?
11. Respondents were asked what they thought of the Sulha process in Israel and whether this process achieves restorative justice. An absolute majority of



respondents answered that the Sulha process does achieve restorative justice. What is your opinion?

12. Respondents were asked to identify the contribution of the Sulha process in Israel to restorative justice, as perceived by Israeli society and the Israeli public. All of the respondents answered that Israeli society and the Israeli public accept the Sulha process and are satisfied with it because it delivers restorative justice. What is your reaction?
13. Respondents were asked what might be done in order to improve the existing Sulha process in Israel. The vast majority of respondents answered that the Sulha process in Israel should be improved through its incorporation in the Israeli criminal process. Some respondents suggested the appointment of professional, objective Sulha council (*jaha*) members who are respected by society and have legal education (e.g. attorneys, retired judges). What is your opinion?
14. The respondents were asked whether in practice the Sulha process in Israel achieves its principal purpose, viz. restorative justice, i.e. identifies injuries by restoring the injuries that came about due to the conflict that arose between the offender, and the victim of the offense and the community as a result of the criminal act. All respondents but one answered that the Sulha process in Israel achieves restorative justice and restores the injuries that came about between the offender, and the victim of the offense and the community due to the offense. What is your opinion?
15. Respondents were asked whether in practice the Sulha process in Israel achieves its ancillary purpose of reconciliation and instilling peace between the parties affected by the criminal act. All of the respondents answered affirmatively, i.e. that the Sulha process in Israel achieves reconciliation and instills peace between the parties affected by the criminal act. What is your opinion?
16. Respondents were asked to identify the contribution of the Sulha process in Israel to reconciliation and instilling peace in Israeli society. The vast majority of respondents answered that the Sulha process in Israel makes a great contribution to reconciliation and instilling peace in Israeli society. What is your opinion?
17. Finally, respondents were asked what might be done to improve the Sulha process in Israel in respect of achieving reconciliation and instilling peace in Israeli society.

All respondents but one answered that the Sulha process should be given legal status and incorporated in the Israeli criminal process. What is your opinion (please discuss)?

18. General comments, if any:

## **Appendix C: Study Information Form and participant's informed consent form**

Name of researcher: Shakieb Serhan

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Name of study: The Legal Status of *Sulha* in Israeli Criminal Law

Nature of study: D. Ed. Dissertation, University of Derby, England

Advisor(s): Mr Kevin Bampton ;Dr Val Poultney.

### **A. Study Rationale and Professional Literature**

By his nature, man is a complex cognitive creature, and a social one. Living socially is the only guarantee of human existence, and the social contract is the foundation of the social and political framework of a democratic state.

On May 14, 1948, the State of Israel was established. It is defined as a Jewish and democratic state, as specified in the Declaration of Independence and in Basic Law: Human Dignity and Liberty and Freedom of Occupation. The Declaration of Independence establishes, inter alia, that the State of Israel “will be based on freedom, justice, and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race, or sex; it will guarantee freedom of religion, conscience, language, education, and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.” The declaration also called on Israel’s Arab population to take part in building the state on a foundation of full and equal citizenship and of appropriate representation in all state institutions.

As of the eve of Rosh Hashana 2010, the population of Israel numbers approximately 7,645,500 individuals, of whom 75.48% are Jews; 20.39% belong to

religions other than Judaism (Muslims, Christians, and Druze); and 4.13% have no religion.

As a rule, the Arab minority, which comprises 18% of the population, has no substantive collective rights. It is not officially recognized as a national minority deserving of collective rights, with three exceptions: the status of Arabic as an official language,

Arab-Israeli education, and exemption from mandatory service in the Israel Defense Forces.

The structure of the Israeli judiciary (as of the close of 2009) consists of the Supreme Court, in Jerusalem, and its fifteen judges;

six district courts, on which 155 judges serve; thirty magistrate courts, on which 382 judges serve; a national labor court in Jerusalem; and five district labor courts.

Israeli courts' activity in 2009 comprised 674,219 main proceedings that were opened; 666,359 proceedings that were closed; and 479,106 pending cases (Judicial Authority of Israel, *2009 Annual Report*).

The administrative budget of the judicial system for 2009 totaled 1.21051 billion NIS (*ibid.*).

The legal approach practiced in Israel is adversarial. Under this binary approach, proceedings are conducted between the parties. The typical result of a proceeding is that one party wins while the other loses.

The objective of the judicial process is to achieve justice, and the search for truth is the means of achieving justice. Without justice there can be no truth, and without truth there can be no justice. In the present reality of the Israeli legal world, it is not always possible to discover the truth or to do justice.

In my view, social deviance, including deviance from norms defining criminal behavior, is a phenomenon inherent to the human race and to social life. The nature of the appropriate social reaction to it has occupied humanity since the dawn of history, and will continue to occupy men forevermore. The social reaction to social deviance is one that is fundamentally relative and dependent on the time, space, and sphere that together form its context, as well as on the society in question. Modern

society generally offers a selection of penalties for social deviance, among which is the judicial process.

The judicial process is not an appropriate tool for settling all conflicts that arise in society, and the assortment of available penalties includes alternate means of conflict resolution as well. One of these is mediation, which is a process in which a licensed mediator meets with the litigants with the aim of bringing them to agree to resolve the conflict, but lacks power to make any determination. The aim of mediation is to achieve a resolution that enjoys the consensus of the parties to the conflict and to instill peace between them.

In the present era, public legal discourse is witness to the increasing popularity of the view that formal criminal law no longer can be the sole reaction to an offense (an approach that characterizes, for instance, the ADR, restorative justice, victimology, and communitarianism schools).

*Sulha* is a type of victim–offender mediation applied in criminal cases from time immemorial among Israel’s non-Jewish minority. In principle, *Sulha* is not a part of Israeli criminal law and is not binding on the courts.

To my way of thinking, the current state of the Israeli judicial process in all its stages—from investigation to prosecution, determination of guilt, judgment, sentencing, imprisonment, and finally conditional release or pardon—is unsatisfactory and does not always achieve its goal. It is a process in crisis. As of today, there has been no truly adequate progress in the war against crime and criminals, rehabilitation of offenders, and care for victims. The number of offenses is on the rise, as is the prison population. Both crime and criminals exhibit increasing sophistication. The courts’ caseload is too great to bear. The budget devoted by the state to the criminal justice system is enormous, and becomes ever greater as the years pass. Crime and criminals take a heavy toll on the state.

The war against crime and criminals must be prosecuted in a way that preserves an appropriate and correct balance between the two opposite values that inform the character of the State of Israel as a substantive democracy: the values and principles of national and personal security, and the values and principles attending human dignity as well as the offender’s other constitutional rights.

## **B. Research Questions, Objectives, and Justifications**

The research questions informing the present study are as follows:

1. What is the legal status of Sulha in Israeli criminal law?
2. How can the Sulha be incorporated in Israeli criminal law, and what contribution would Sulha make in this respect?
3. What action is required for Sulha to be incorporated in Israeli criminal law?

#### Study Goals and Justifications

It is my belief that in this era of substantive democracy, the system of criminal law that pertains in Israel no longer is an appropriate one. There are numerous philosophical, positivistic, normative, and practical professional justifications for the present argument that incorporation of Sulha within Israeli criminal law would be justified. The justifications are various, drawing on culture and history; economy; justice and ethics; positivist, comparative, and constitutional criminal law; the nature of substantive democracy and its role in the postmodern era; and professional practice.

I hope that the result of this study will be to rationalize the Israeli criminal justice system; find the correct balance between legal individualism and social legal control; lessen the burden borne by the judges of the various courts; reduce the frequency of distortion of justice, particularly where it regards delay of justice and the quantity of erroneous rulings; buttress the standing of human rights, the rights of the offender, and those of the victim; maximize social happiness, welfare, and solidarity to the extent possible; reduce the cost of crime to society; improve the standing of the state's Arab population; and strengthen peace, truth, and justice in Israel.

#### C. **Research Method and Process**

A qualitative approach was employed in the present study. The data collection methods included a Delphi panel; interviews were prepared with the aim of collecting admissible, reliable, and current data; professional experience; and a personal diary. In addition to the primary means of data collection, several secondary sources were employed, including documents, inclusive of professional literature (books and articles); personal notes; recordings, previous studies; and official publications.

The present study is an academic, professional study performed according to accepted academic standards.

Study participants, in principle, will be professionals with a connection to Sulha and to the Israeli legal world. The Delphi panel will include judges, prosecutors, defense counsels, social workers/parole officers, and Sulha council (J'aha) members. The Delphi process will be conducted in three rounds, with the researcher serving as facilitator. The panel will include either seven or eight participants. The process will be anonymous, and the ethical requirements of academic research will be observed.

#### **D. Ethics**

Study participants are not and will not be negatively affected in any way on account of their participation. The study causes damage to no one, and no injury will be done to the human rights of any person. The study's purpose is to serve the interests of society, and it shall be performed within the confines of the law and with respect for the law and the rule of law. Participation in the study is voluntary and of the participants' free will, and will follow each participant's receipt of a copy of this document and voluntary provision of written consent to participate in the study. The study will preserve the participants' privacy, and their participation in it will be anonymous. The participants will be given no consideration of any kind for participating in the study. The entire research process from beginning to end, including cross-referencing of data from the various sources from which it is collected, will be reliable, credible, and unbiased. No funding for the study has been accepted from any party.

No minors are involved in the study. Publication of judgments to which a minor is a party shall be in accordance with the versions published by the courts. There will be no minors among those participating in the study.

The data shall be kept in the possession and safekeeping of the researcher. Data presented in the study are those that are relevant, admissible, and reliable, and will not compromise the privacy of the participants.

## **Research Participant Consent Form**

Name of researcher: Shakieb Serhan

Address: PO Box 710, Majer 20128, Israel

E-mail: sakibs@court.gov.il

Name of study: The Legal Status of Sulha in Israeli Criminal Law

Nature of study: D. Ed. Dissertation, University of Derby, England

Advisor(s): Mr Kevin Bampton; Dr Val Poultney.



<b>Please answer the following questions by circling the correct answer.</b>
<p>A. Have you received, read, and fully understood this study's information form?</p> <p>Yes/no</p>
<p>B. Have you had a real opportunity to ask questions about this study?</p> <p>Yes/no</p>
<p>C. Have you received sufficient information (in writing and orally) concerning this study?</p> <p>Yes/no</p>
<p>D1. Is it clear to you that you are free to discontinue your participation in this study?</p> <p>Yes/no</p> <p>2. ... at any time?</p> <p>Yes/no</p> <p>3. ... without need to give any explanation for discontinuing your participation?</p> <p>Yes/no</p>
<p>E. Your responses will be anonymous prior to being analyzed.</p>
<p>F. Do you permit the researcher/team of researchers to have access to your anonymous responses?</p> <p>Yes/no</p>
<p>G. Do you consent to participate and take part in this study?</p> <p>Yes/no</p>
<p>H. Do you consent to publication of your anonymous responses in the context of the study?</p> <p>Yes/no</p>
<p>Dear Participant,</p> <p>By signing below, you affirm that you have voluntarily decided to participate and take</p>

part in this study and that you have received, read, and understood the information form concerning this study that was prepared for participants. By signing below, you also affirm that you have had a real opportunity to discuss the study with the researcher as well as received complete and satisfactory answers to all of your questions on the matter.

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**Signature of participant**

---

**Date**

---

**Full name of participant**

---

**Identification number**

---

**Telephone**

---

**Signature of researcher**

---

**Date**

**Appendix D: Criminal Cases during Years 1990 – 2014, which relating to Sulha.**

Judgments resource: <http://www.takdin.co.il>

CrimA 3317/13 *A'asam v. Israel State* TKHC 2013(3) 1963  
 CrimR 5734/12 *A'mash v. Israel State* TKHC 2012(3) 7972  
 CrimA 5909/09 *Abaida v. Israel State* TKHC 2009(4) 2202  
 ArrR (Bes) 1618-12-12 *Abalkian v. Israel State* TKDC 2013(4) 15594  
 CrimA (Jer) 10059-04-13 *Abaras v. Israel State* TKDC 2013(2) 13352  
 CrimA 1974/12 *Abas v. Israel State* TKHC 2012(4) 13087  
 AAA (Naz) 1139/04 *Abas v. Parole (GA)* TKDC 2004(1) 9844  
 CrimA 607/07 *Abdalsalam v. Israel State* TKHC 2007(2) 1227  
 CrimA 1275/95 *Abu Asah v. Israel State* TKHC 1995(2) 34  
 CrimR 5172/95 *Abu Assa v. Israel State* TKHC 1995(3) 167  
 CrimA 2571/13 *Abu Foul v. Israel State* TKHC 2014(4) 727  
 CrimR 5231/99 *Abu Hader v. Israel State* TKHC 1999(3) 318  
 CrimA 4383/07 *Abu Pani v. Israel State* TKHC 2007(4) 4716  
 CrimR 6157/11 *Abu Zied v. Israel State* TKHC 2011(3) 3824  
 AAA (Naz) 52603-01-12 *Abu Zwaïd v. Prison Service* TKDC 2012(1) 9881  
 CrimR 5072/07 *Abu'abid v. Israel State* TKHC 2007(3) 4016  
 AAA (Mrk) 7409-04-12 *Abuabed v. Parole (GA)* TKDC 2012(2) 1151  
 CrimA 2108/12 *Abuganem v. Israel State* TKHC 2014(1) 9636  
 CrimA 5835/12 *Abuhadona v. Israel State* TKHC 2012(3) 6218  
 CrimR 5191/13 *Abuhamid v. Israel State* TKHC 2013(3) 3622  
 CrimA 1676/08 *Abuhani v. Israel State* TKHC 2009(2) 2661  
 CrimR 441/14 *Abujami'a v. Israel State* TKHC 2014(1) 5366  
 CrimA 1920/05 *Abukaian v. Israel State* TKHC 2005(4) 1694  
 CrimR 6427/09 *Abulhaja v. Israel State* TKHC 2009(3) 3031  
 CrimA 37861/12 *Aburaia v. Israel State* TKHC 2013(1) 2553  
 CrimA 3361/91 *Aburas v. Israel State* TKHC 1991(3) 2236  
 CrimR 7734/98 *Aburas v. Israel State* TKHC 1998(4) 713  
 CrimA 5211/09 *Aburas v. Israel State* TKHC 2009(3) 4918  
 CrimR (Jer) 6148/06 *Aburemala v. Israel State* TKDC 2006(1) 8212  
 CrimA 2974/11 *Aburmela v. Israel State* TKHC 2012(4) 7430

ArrR (Bes) 49199-05-12 *Abusamor v. Israel State* TKDC 2013(1) 7416  
 CrimA 5476/13 *Abuserhan v. Israel State* TKHC 2013(4) 12247  
 CrimR 5982/02 *Abushams v. Israel State* TKHC 2002(2) 483  
 ArrR (Bes) 13306-01-10 *Abushet v. Israel State* TKMC 2010(2) 90333  
 CrimA 875/12 *Abutaha v. Israel State* TKHC 2012(1) 2056  
 ArrR (Bes) 21819/09 *Abutaha v. Israel State* TKDC 2010(2) 14329  
 CrimR 9987/08 *Abutaha v. Israel State* TKHC 2008(4) 3149  
 CrimA 875/12 *Abutaha v. Israel State* TKHC 2013(1) 2046  
 CrimR 4489/08 *Adre'ai v. Israel State* TKHC 2008(2) 3614  
 CrimR 5632/11 *Akil v. Israel State* TKHC 2011(3) 2404  
 CrimA (Mrk) 34910-05-12 *Alabra v. Israel State* TKDC 2012(3) 12480  
 CrimA 2957/10 *Alatrash v. Israel State* TKHC 2012(2) 3852  
 CrimR 7567/13 *Albahabca v. Israel State* TKHC 2014(4) 5302  
 ArrR (Res) 28070-02-13 *Albahiri v. Israel State* TKDC 2013(2) 21768  
 CrimA 6452/09 *Ali v. Israel State* TKHC 2009(3) 2941  
 CrimA 6452/09 *Ali v. Israel State* TKHC 2010(3) 881  
 CrimA 2663/08 *Alkam v. Israel State* TKHC 2008(3) 5628  
 AAA (Jer) 38157-10-13 *Allalo v. Parole (GA)* TKDC 2013(4) 20250  
 ArrR (Bes) 13325-04-13 *Altori v. Israel State* TKDC 2014(1) 16201  
 CrimA 1146/14 *Altori v. Israel State* TKHC 2014(1) 12089  
 CrimA 7639/13 *Amara v. Israel State* TKHC 2014(2) 207  
 CrimR 2410/13 *Amash v. Israel State* TKHC 2013(2) 1516  
 ArrR (Jer) 13860-07-10 *Amia v. Israel State* TKMC 2010(4) 176314  
 CrimR 399/09 *Anwar v. Israel State* TKHC 2009(1) 2424  
 CrimA 1695/04 *Ashwah v. Israel State* TKHC 2004(1) 1544  
 ArrR (Kra) 53756-07-10 *Aslay v. Israel State* TKMC 2010(4) 63050  
 ArrR (Hai) 26778-07-11 *Assadi v. Israel State* TKDC 2011(4) 6780  
 AAA (Naz) 50665-03-12 *Assi v. Parole (GA)* TKDC 2012(2) 6351  
 CrimA 9232/13 *Awad v. Israel State* TKHC 2013(3) 7387  
 CrimR 794/06 *Awawdi v. Israel State* TKHC 2006(1) 3565  
 CrimR 1646/91 *Badarni v. Israel State* TKHC 1991(2) 2865  
 CrimA 2575/90 *Badran v. Israel State* TKHC 1991(2) 2243  
 CrimR 5686/93 *Badrani v. Israel State* TKHC 1993(3) 1458

CrimR 4370/92 *Baker v. Israel State* TKHC 1992(3) 1293  
 CrimA 8280/11 *Baker v. Israel State* TKHC 2012(2) 1497  
 CrimA 2791/09 *Bakri v. Israel State* TKHC 2008(2)4692  
 ArrR (Naz) 42063-04-12 *Betar v. Israel State* TKDC 2013(3) 18668  
 CrimR 6843/11 *Bheri v. Israel State* TKHC 2011(3) 4457  
 CrimA 2951/12 *Biadsi v. Israel State* TKHC 2012(3) 4848  
 CrimR 553/08 *Buka'ie v. Israel State* TKHC 2008 (1) 897  
 CrimA 89/06 *C. v. Israel State* TKHC 2007(1) 4750  
 CrimA 6868/93 *Cabali v. Israel State* TKHC 1994(2) 460  
 AAA (Mer) 53724-03-12 *D'aas v. Parole* (GA) TKDC 2012(2) 12141  
 CrimA 2918/13 *Dabas v. Israel State* TKHC 2013(3) 1952  
 CrimA 174/09 *Dvirei v. Israel State* TKHC 2009(2) 4836  
 CrimA 2848/21 *Ebrahim v. Israel State* TKHC 1992(1) 140  
 CrimA 6432/99 *Ebrahim v. Israel State* TKHC 1999(4) 25  
 AAA (Mrk) 29167-11- *Ebrahim v. Parole* (GA) TKDC 2011(4) 11  
 AAA (Mrk) 34666-08-13 *Ebrahim v. Prison Service* TKDC 2013(3) 14025  
 CrimR 7216/05 *Egbar v. Israel State* TKHC 2005(3) 2384  
 CrimR 7835/09 *Egbaria v. Israel State* TKHC 2009(4) 425  
 AAA (Naz) 1267/07 *Egbaria v. Parole* (GA) TKDC 2007(2) 5660  
 CrimR 11008/05 *Eied v. Israel State* TKHC 2005(4) 2951  
 CrimR 2397/14 *Elataigu v. Israel State* TKHC 2014(2) 1460  
 CrimR 5682/12 *Elfrahin v. Israel State* TKHC 2012(3) 7009  
 CrimR 10643/07 *Elhadi v. Israel State* TKHC 2007(4) 4981  
 CrimR 5481/03 *Elkaian v. Israel State* TKHC 2003(2) 3205  
 CrimR 5298/11 *Elkaian v. Israel State* TKHC 2011(3) 1920  
 CrimR 5745/11 *Elkaian v. Israel State* TKHC 2011(3) 3042  
 CrimA 107/08 *Elmahdi v. Israel State* TKHC 2010(1) 2681  
 CrimR 627/01 *Elrabea'a v. Israel State* TKHC 2001(1) 1151  
 CrimA 6279/05 *Elrazeq v. Israel State* TKHC 2005(3) 4278  
 CrimR 2007/08 *Elsaid v. Israel State* TKHC 2008(1) 3981  
 CrimA 6989/13 *Farah v. Israel State* TKHC 2014(1) 12766  
 AAA (Mrk) 8411-04-12 *GA v. Parole* TKDC 2012(2) 1545  
 AAA (Mrk) 56363-07-13 *GA v. Parole* TKDC 2013(3) 18517

ArrA (Hai) 27966-12-11 *Gabren v. Israel State* TKDC 2011(4) 22393  
 CrimR 1259/14 *Gamid v. Israel State* TKHC 2014(1) 12288  
 ArrR (Bes) 4842-02-10 *Gloiat v. Israel State* TKMC 2010(3) 85279  
 CrimA 4979/09 *Gorban v. Israel State* TKHC 2009(4) 2543  
 CrimR 3511/94 *Haber v. Israel State* TKHC 1994(2) 1480  
 CrimR 3712/13 *Habib'alla v. Israel State* TKHC 2013(2) 7789  
 CrimR 5230/13 *Habibala v. Israel State* TKHC 2013(3) 3724  
 CrimR 10410/05 *Haded v. Israel State* TKHC 2005(4) 1584  
 CrimA 3293/09 *Hafih v. Israel State* TKHC 2009(2) 3214  
 CrimA 5845/13 *Haj v. Israel State* TKHC 2014(1) 31373  
 CrimA 11940/05 *Hajyihia v. Israel State* TKHC 2006(1) 2914  
 CrimR 8687/10 *Hajyihia v. Israel State* TKHC 2010(4) 2507  
 CrimR 6951/10 *Hajyihia v. Israel State* TKHC 2010(4) 85  
 CrimR 6852/13 *Halid T. v. Israel State* TKHC 2014(4) 3046  
 CrimA 5873/07 *Halid v. Israel State* TKHC 2007(2) 5277  
 CrimA 4565/13 *Halid v. Israel State* TKHC 2014(4) 4111  
 CrimA 865/09 *Hamid v. Israel State* TKHC 2009(4) 3636  
 CrimA 4123/99 *Hamoda v. Israel State* TKHC 1999(3) 733  
 CrimA 8728/06 *Hamodi v. Israel State* TKHC 2006(4) 1256  
 CrimA 8728/06 *Hamuda v. Israel State* TKHC 2007(1) 1787  
 CrimA 3871/99 *Hamza v. Israel State* TKHC 2001(2) 219  
 CrimR (Naz) 1526/09 *Hassan v. Israel State* TKDC 2009(3) 11194  
 ArrR (Naz) 21891-01-13 *Hassan v. Israel State* TKDC 2013(2) 6943  
 CrimA 3283/09 *Hateb v. Israel State* TKHC 2009(4) 402  
 CrimR 5701/96 *Heib v. Israel State* TKHC 1996(3) 996  
 CrimA 3427/13 *Heib v. Israel State* TKHC 2013(3) 3837  
 AAA (Naz) 1356/06 *Heib v. Parole (GA)* TKDC 2006(2) 18707  
 CrimR 2570/12 *Hiab v. Israel State* TKHC 2012(2) 500  
 CrimA 6614/07 *Hindawi v. Israel State* TKHC 2009(3) 1365  
 CrimA 5240/93 *Hmad v. Israel State* TKHC 1994(4) 221  
 AAA (Mrk) 28761-05-11 *Hmad v. Parole (GA)* TKDC 2011(3) 4600  
 AAA (Mrk) 22570-10-11 *Hmad v. Parole (GA)* TKDC 2011(4) 5989  
 AAA (Naz) 604/09 *Hussni v. Parole (GA)* TKDC 2009(3) 13874

CrimA 6116/04 *Ibrahim v. Israel State* TKHC 2004(3) 1676  
 CrimC (Jer) 213/98 *Israel State v. A'isa* TKDC 1998(4) 1621  
 ArrR (Ako) 56898-07-13 *Israel State v. A'mir* TKMC 2013(4) 48382  
 CrimC (Ako) 12935-07-08 *Israel State v. A'rabi* TKMC 2009(2) 24332  
 CrimC (Ako) 10201-06-11 *Israel State v. Abas* TKMC 2012(1) 87366  
 CrimC (Hai) 42006-10-11 *Israel State v. Abramovich* TKDC 2012(1) 10830  
 ArrR (Bes) 31403-08-11 *Israel State v. Abu Kaf* TKMC 2011(3) 37590  
 CrimR (Hai) 3558/06 *Israel State v. Abu Moh* TKDC 2006(4) 6868  
 ArrR (Ram) 1509-10-09 *Israel State v. Abu Mosa* TKMC 2009(4) 477  
 CrimC (Hai) 60307-10-13 *Israel State v. Abu'abed* TKDC 2014(2) 19925  
 CrimR 7930/13 *Israel State v. Abua'amar* TKHC 2013(4) 7117  
 ArrR (Bes) 17683-10-13 *Israel State v. Abua'amiar* TKDC 2013(4) 14583  
 CrimC (Ram) 3430/06 *Israel State v. Abuaish* TKMC 2010(2) 110603  
 ArrR (Ako) 44188-12-11 *Israel State v. Abubasal* TKMC 2012(1) 45381  
 RA (Jer) 2042-04-11 *Israel State v. Abuelhawa* TKMC 2011(4) 76152  
 ArrR (Bes) 5292-03-11 *Israel State v. Abugreba* TKDC 2011(1) 123529  
 CrimR 6487/05 *Israel State v. Abugreba* TKHC 2005(3) 1348  
 ArrR (Ako) 9251-12-12 *Israel State v. Abuhamod* TKMC 2012(4) 79845  
 ArrR (Rel) 48710-03-10 *Israel State v. Abuhar* TKMC 2010(1) 94327  
 CrimR (Jer) 13895/09 *Israel State v. Abuqtesh* TKMC 2009(4) 8593  
 ArrR (Jer) 22130-08-11 *Israel State v. Aburas* TKDC 2012(1) 32384  
 CrimC (Naz) 8766-10-11 *Israel State v. Aburas* TKDC 2012(1) 35982  
 RA (Jer) 1879-07-12 *Israel State v. Aburas* TKMC 2013(1) 32338  
 ArrR (Bes) 11462-03-13 *Israel State v. Aburekak* TKDC 2013(1) 17502  
 ArrR (Mrk) 2079-06-09 *Israel State v. Abusabalan* TKDC 2009(3) 3555  
 CrimC (Naz) 8402-09-12 *Israel State v. Abusalah* TKDC 2013(1) 9330  
 ArrR (Zef) 1706-04-11 *Israel State v. Abusaleh* TKMC 2011(2) 5088  
 RA (Jer) 3900-09-11 *Israel State v. Abusara* TKMC 2012(4) 70805  
 CrimR 8105/12 *Israel State v. Abuserhan* TKHC 2012(4) 6596  
 ArrR (Hai) 15296-06-13 *Israel State v. Abushanab* TKDC 2013(2) 19903  
 CrimC (Jer) 5342/06 *Israel State v. Abusheh* TKMC 2010(2) 155776  
 ArrR (Naz) 55903-05-12 *Israel State v. Abushkara* TKMC 2012(2) 47737  
 ArrR (Kra) 57970-09-11 *Israel State v. Afma* TKMC 2011(3) 65673

CrimC (Hai) 153/94 *Israel State v. Ahmad* TKDC 1995(2) 1106  
 CrimC (Hai) 19681-04-13 *Israel State v. Ahmad* TKDC 2014(4) 12669  
 ArrR (Ako) 14667-06-11 *Israel State v. Akawi* TKMC 2011(2) 134313  
 ArrR (Had) 35965-02-10 *Israel State v. Akel* TKMC 2010(1) 87343  
 CrimC (Bes) 3034-09-11 *Israel State v. Alatrash* TKDC 2012(3) 3572  
 CrimR 7484/13 *Israel State v. Albahir* TKHC 2014(4) 4509  
 CrimR 4562/13 *Israel State v. Albahiri* TKHC 2013(2) 11845  
 CrimR (Bes) 21593/09 *Israel State v. Alfutah* TKDC 2009(4) 3778  
 ArrR (Bes) 38073-04-10 *Israel State v. Alhuzail* TKMC 2010(2) 39372  
 CrimC (Naz) 1034/08 *Israel State v. Ali* TKDC 2007(2) 8847  
 CrimC (Jer) 496/97 *Israel State v. Alian* TKDC 1999(3) 3034  
 CrimC (Tel) 4112/09 *Israel State v. Almakev* TKDM 2010(1) 6931  
 CrimC (Ret) 867-07-09 *Israel State v. Alobra* TKMC 2012(2) 14742  
 CrimC (Bes) 28/93 *Israel State v. Altori* TKDC 1995(1) 168  
 CrimR 5886/10 *Israel State v. Altori* TKHC 2010(3) 2359  
 CrimR (Naz) 1538/06 *Israel State v. Amara* TKDC 2006(2) 1166  
 CrimC (Naz) 14537-07-11 *Israel State v. Amara* TKDC 2011(4) 3178  
 CrimC (Naz) 19697-01-13 *Israel State v. Amara* TKDC 2014(4) 2854  
 CrimA 4100/08 *Israel State v. Amara* TKHC 2008(4) 1468  
 ArrR (Had) 27471-03-10 *Israel State v. Amash* TKMC 2010(4) 79616  
 CrimC (Naz) 2779-08-11 *Israel State v. Amir* TKDC 2012(4) 17101  
 ArrR (Hai) 35893-06-12 *Israel State v. Amon* TKDC 2012(3) 120  
 ArrR (Ako) 6329-09-11 *Israel State v. Amon* TKMC 2011(3) 59716  
 CrimC (Naz) 26/94 *Israel State v. Ashkar* TKDC 1996(2) 1377  
 CrimC (Kfs) 2572/03 *Israel State v. Ashkar* TKMC 2004(1) 21517  
 CrimC (Ako) 2709-04 -10 *Israel State v. Ashkar* TKMC 2012(2) 87475  
 CrimC (Hai) 237/96 *Israel State v. Assadi* TKDC 1997(2) 1628  
 ArrR (Bes) 61548-03-14 *Israel State v. Attawni* TKDC 2014(2) 6500  
 CrimC (Naz) 45550-02-13 *Israel State v. Auob* TKDC 2014(1) 33754  
 ArrR (Jer) 8687-05-11 *Israel State v. Awadalla* TKMC 2011(2) 54266  
 CrimC (Kfs) 1277/09 *Israel State v. Awda* TKMC 2010(4) 117526  
 CrimC (Ako) 9762-07-08 *Israel State v. Awzim* TKMC 2009(3) 1915  
 CrimC (Tea) 1095/01 *Israel State v. Azam* TKDC 2002(1) 1587



ArrR (Had) 39979-12-09 *Israel State v. Bader* TKMC 2010(1) 49464  
 CrimC (Ako) 12248-10-10 *Israel State v. Bader* TKMC 2011(3) 3905  
 CrimR (Hai) 1244/01 *Israel State v. Badra* TKDC 2001(1) 1887  
 CrimR 843/05 *Israel State v. Badran* TKHC 2005(1) 1809  
 CrimR 4997/12 *Israel State v. Baheri* TKHC 2012(3) 1632  
 CrimR 6153/12 *Israel State v. Baheri* TKHC 2012(3) 8658  
 CrimC (Hai) 4136/05 *Israel State v. Belal* TKDC 2005(4) 8221  
 CrimC (Naz) 1105/06 *Israel State v. Ben-Ag* TKDC 2007(4) 6425  
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 ArrR (Jer) 44751-11-13 *Israel State v. X* TKDC 2013(4) 28724  
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 ArrR (Bes) 27617-03-14 *Israel State v. X* TKDC 2014(2) 1570  
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 CrimA (Hai) 7283-03-14 *Mahajni v. Israel State* TKDC 2014(2) 21241  
 CrimA 1683/08 *Mahamid v. Israel State* TKHC 2008(1) 3774  
 CrimA 8029/12 *Mahrom v. Israel State* TKHC 2013(2) 7735  
 ArrR (Hai) 5519-01-13 *Majdob v. Israel State* TKDC 2013(2) 3807  
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 CrimR 3356/92 *Mariana v. Israel State* TKHC 1992(2) 2299  
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 CrimA 9896/09 *Mashahra v. Israel State* TKHC 2009(4) 10397  
 CrimA 123/13 *Massarwa v. Israel State* TKHC 2013(2) 676  
 CrimR 10902/08 *Massarwi v. Israel State* TKHC 2008(4) 4469  
 CrimA 3013/11 *Matar v. Israel State* TKHC 2011(2) 870  
 CrimA 4769/97 *Maz'aro v. Israel State* TKHC 1997(4) 829

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 CrimC 115/10 *Moamar v. Israel State* TKHC 2010(1) 2060  
 CrimR 1496/93 *Moflak v. Israel State* TKHC 1993(2) 681  
 CrimR 9015/01 *Mohamad v. Israel State* TKHC 2001(3) 256  
 CrimA 3220/09 *Mohamad v. Israel State* TKHC 2009(4) 1416  
 CrimA 8242/13 *Morad v. Israel State* TKHC 2014(2) 4931  
 CrimR 7090/00 *Morni v. Israel State* TKHC 2000(3) 1661  
 CrimA 4474/12 *Mossa v. Israel State* TKHC 2013(2) 333  
 CrimR 9837/09 *Mostafa v. Israel State* TKHC 2009(4) 10395  
 CrimA 8691/08 *Mresat v. Israel State* TKHC 2009(2) 1603  
 CrimA 511/11 *Mresat v. Israel State* TKHC 2011(1) 928  
 CrimA 5316/13 *Msalha v. Israel State* TKHC 2013(4) 9474  
 CrimR 3645/13 *Na'ama v. Israel State* TKHC 2013(2) 9163  
 ArrR (Jer) 537-10 *Nadel v. Israel State* TKDC 2010(3) 10036  
 CrimA 4528/02 *Najar v. Israel State* TKHC 2002(3) 578  
 ArrR (Bes) 20761/09 *Nasara v. Israel State* TKDC 2010(2) 1456  
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 ArrR (Hai) 23381-02-10 *Nasser v. Israel State* TKDC 2010(3) 1255  
 ArrR (Naz) 62279-01-14 *Nasser v. Israel State* TKDC 2014(1) 42911  
 AAA (Naz) 33975-03-12 *Nasser v. Parole (GA)* TKDC 2012(2) 792  
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 ArrA (Naz) 23389/11/11 *Nwesser v. Israel State* TKDC 2011(4) 6205  
 CrimR 3752/98 *Odatalla v. Israel State* TKHC 1998(2) 288  
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 CrimA 665/12 *Omaria v. Israel State* TKHC 2012(1) 1907  
 CrimA 666/12 *Omaria v. Israel State* TKHC 2012(2) 4211  
 CrimA 700/12 *Oudalla v. Israel State* TKHC 2012(4) 26804  
 CrimA 9232/12 *Owad v. Israel State* TKHC 2013(1) 136  
 CrimR 3391/13 *Oweda v. Israel State* TKHC 2013(2) 6412  
 ArrR (Hai) 48915-12-12 *Rashar v. Israel State* TKDC 2013(2) 21272  
 CrimA 8641/12 *Sa'ad v. Israel State* TKHC 2013(3) 4312

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 ArrR (Zef) 4025-04-10 *Salha v. Israel State* TKMC 2050(2) 74280  
 CrimA 6840/04 *Salman v. Israel State* TKHC 2004(3) 898  
 AAA 2154/11 *Saluta v. Parole (GA)* TKHC 2011(2) 78  
 CrimA 6421/11 *Samari v. Israel State* TKHC 2012(2) 3939  
 CrimR 7426/02 *Seksek v. Israel State* TKHC 2002(3) 1456  
 CrimFC 3261/03 *Serhan v. Israel State* TKHC 2003(1) 698  
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 LCrimA 10556/08 *Shaban v. Israel State* TKHC 2008(4) 3890  
 CrimA 3703/08 *Shahada v. Israel State* TKHC 2008(3) 4039  
 CrimA 9468/07 *Shalabhi v. Israel State* TKHC 2009(2) 3972  
 CrimR 691/09 *Sheban v. Israel State* TKHC 2009(3) 4042  
 CrimA 4131/13 *Shmari v. Israel State* TKHC 2014(1) 15953  
 CrimA 811/96 *Shmoul v. Israel State* TKHC 1997(2) 464  
 CrimA (Naz) 29028-03-12 *Shtewi v. Israel State* TKDC 2012(1) 16658  
 CrimR (Tea) 1276/92 *Smara v. Israel State* TKDC 1992(2) 522  
 CrimR 3433/12 *Smari v. Israel State* TKHC 2012(2) 2594  
 CrimA 4311/12 *Suri v. Israel State* TKHC 2012(4) 4915  
 ArrR (Naz) 8552-12-13 *Swalha v. Israel State* TKDC 2013(4) 29040  
 AAA (Hai) 36736-02-12 *Taha H. v. Prison Service* TKDC 2012(1) 14876  
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 CrimA 3004/12 *Tarbien v. Israel State* TKHC 2014(1) 12044  
 CrimR 3149/04 *Tarif v. Israel State* TKDC 2004(1) 3432  
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 CrimR 3680/10 *X v. Israel State* EKHC 2010(2) 2687  
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 CrimA 10876/05 *X v. Israel State* TKHC 2006(3) 1704  
 CrimR 7547/06 *X v. Israel State* TKHC 2006(3) 4655  
 CrimA 5607/02 *X v. Israel State* TKHC 2006(4) 1801  
 CrimR 8449/07 *X v. Israel State* TKHC 2007(4) 316  
 CrimA 1183/08 *X v. Israel State* TKHC 2008(2) 3828  
 CrimR 6762/09 *X v. Israel State* TKHC 2009(3) 3179  
 CrimR (Jer) 8820/09 *X v. Israel State* TKHC 2009(4) 2892  
 CrimR 27/12 *X v. Israel State* TKHC 2012(1) 10027  
 CrimA 8306/11 *X v. Israel State* TKHC 2012(2) 1714  
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 CrimA 1262/12 *X v. Israel State* TKHC 2012(3) 11417  
 CrimR 5496/12 *X v. Israel State* TKHC 2012(3) 3622  
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 CrimA 1585/12 *X v. Israel State* TKHC 2012(4) 8196  
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 CrimA 7315/13 *X v. Israel State* TKHC 2014(1) 13048  
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 CrimA 8196/13 *X v. Israel State* TKHC 2014(2) 428  
 CrimA 1568/14 *X v. Israel State* TKHC 2014(2) 4988  
 CrimA 5949/13 *X v. Israel State* TKHC 2014(4) 5533  
 CrimR 2838/00 *Yasin v. Israel State* TKHC 2000(2) 452  
 CrimA 10837/08 *Yassin v. Israel State* TKHC 2008(2) 4661  
 AAA (Naz) 12580-02-12 *Yihia v. Israel State* TKDC 2012(1) 13889  
 CrimA 6340/11 *Zahiaka v. Israel State* TKHC 2012(1) 3353  
 CrimA 8916111 *Zarien v. Israel State* TKHC 2012(2) 705  
 CrimA 5918/99 *Zbedat v. Israel State* TKHC 2004(1) 401  
 CrimA (Naz) 1283/07 *Zo'abi v. Israel State* TKDC 2008(1) 12113  
 ArrR (Naz) 15625-02-13 *Zo'abi v. Israel State* TKDC 2013(2) 16073  
 CrimA 1108/00 *Zo'abi v. Israel State* TKHC 2001(3) 245

CrimR 5936/10 *Zoabi v. Israel State* TKHC 2010(3) 2961

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CrimA 5625/11 *Zobaidat v. Israel State* TKHC 2012(1) 5298

CrimA 3222/13 *Zuariz v. Israel State* TKHC 2013(3) 9521

## **Appendix E: Parole Decisions**

Resource: <http://ethics.court.gov.il>. Release Com. Decisions

*X v. GA Aialon Prison Sep. 14, 2011*

*X v. GA Aialon Prison Sep. 9, 2011*

*X v. GA Aialon Prison Sep. 6, 2011*

*X v. GA Aialon Prison Mar. 20, 2012*

*X v. GA Aialon Prison Mar. 13, 2012*

*X v. GA Aialon Prison Apr. 24, 2012*

*X v. GA Aialon Prison Apr. 24, 2012*

*X v. GA Aialon Prison May 12, 2012*

*X v. GA Aialon Prison Jun. 26, 2012*

*X v. GA Ayalon Prison Oct. 10, 2012*

*X v. GA Ayalon Prison Jan. 15, 2013*

*X v. GA Ayalon Prison Mar. 12, 2013*

*X v. GA Damon Prison Mar. 6, 2012*

*X v. GA Damon Prison Sep. 17, 2012*

*X v. GA Damon Prison Feb. 26, 2013*

*X v. GA Damon Prison Feb. 26, 2013*

*X v. GA Hakarmel Prison Jul. 17, 2008*

*X v. GA Hakarmel Prison Nov. 27, 2008*

*X v. GA Hakarmel Prison Dec. 11, 2008*

*X v. GA Hakarmel Prison May 10, 1009*

*X v. GA Hakarmel Prison Sep. 9, 2009*

*X v. GA Hakarmel Prison Jul. 17, 2011*

*X v. GA Hakarmel Prison Nov. 13, 2011*

*X v. GA Hakarmel Prison Sep. 9, 2011*

*X v. GA Hakarmel Prison Mar. 11, 2012*

*X v. GA Hakarmel Prison Dec. 12, 2011*

*X v. GA Hakarmel Prison Jun. 10, 2012*

*X v. GA Hakarmel Prison Feb. 17, 2012*

*X v. GA Hakarmel Prison Feb. 3, 2013*

*X v. GA Hakarmel Prison Feb. 27, 2013*

*X v. GA Hakarmel Prison* Apr. 7, 2013  
*X v. GA Hasharon Prison* Jun. 7, 2006  
*X v. GA Hasharon Prison* Sep. 5, 2011  
*X v. GA Hasharon Prison* Sep. 5, 2011  
*X v. GA Hasharon Prison* Oct. 5, 2011  
*X v. GA Hasharon Prison* Dec. 14, 2011  
*X v. GA Hasharon Prison* Dec. 14, 2011  
*X v. GA Hasharon Prison* Feb. 5, 2012  
*X v. GA Hasharon Prison* Nov. 28, 2011  
*X v. GA Hasharon Prison* Apr. 2, 2012  
*X v. GA Hasharon Prison* Apr. 1, 2012  
*X v. GA Hasharon Prison* Mar. 26, 2012  
*X v. GA Hasharon Prison* 2 May 12  
*X v. GA Hasharon Prison* Jul. 26, 2012  
*X v. GA Hasharon Prison* Nov. 15, 2012  
*X v. GA Hasharon Prison* Nov. 5, 2012  
*X v. GA Hasharon Prison* Nov. 7, 2012  
*X v. GA Hasharon Prison* Jan. 17, 2013  
*X v. GA Hasharon Prison* Mar. 20, 2013  
*X v. GA Hasharon Prison* Dec. 19, 2012  
*X v. GA Hasharon Prison* Nov. 19, 2012  
*X v. GA Hermon Prison* Oct. 10, 2010  
*X v. GA Ma'asyaho Prison* Jun. 6, 2011  
*X v. GA Ma'asyaho Prison* Jun. 2, 2011  
*X v. GA Ma'asyaho Prison* Aug. 4, 2011  
*X v. GA Ma'asyaho Prison* Aug. 4, 2011  
*X v. GA Ma'asyaho Prison* Jan. 24, 2012  
*X v. GA Ma'asyaho Prison* Jan. 24, 2012  
*X v. GA Ma'asyaho Prison* Feb. 2, 2012  
*X v. GA Ma'asyaho Prison* Feb. 9, 2012  
*X v. GA Ma'asyaho Prison* Jan. 3, 2013  
*X v. GA Ma'asyaho Prison* Jan. 3, 2013  
*X v. GA Ma'asyaho Prison* Dec. 6, 2012

*X v. GA Ma'asyaho Prison Apr. 4, 2013*  
*X v. GA Ma'asyaho Prison Nov. 15, 2012*  
*X v. GA Ma'asyaho Prison Nov. 18, 2012*  
*X v. GA Ma'asyaho Prison Oct. 30, 2012*  
*X v. GA Ma'asyaho Prison Jan. 8, 2013*  
*X v. GA Ma'asyaho Prison Mar. 17, 2013*  
*X v. GA Ma'asyaho Prison Mar. 17, 2013*  
*X v. GA Ma'asyaho Prison Apr. 25, 2013*  
*X v. GA Maisyaho Prison 14 May 12*  
*X v. GA Maisyaho Prison 14 May 12*  
*X v. GA Maisyaho Prison Jun. 21, 2012*  
*X v. GA Majedo Prison Jul. 23, 2006*  
*X v. GA Zalmon Prison Mar. 24, 2008*



## **Appendix F:**

### **Criminal Procedure [Consolidated Version] (Legislation) (Sulha process) Draft-2017 Addition of Section 143b**

1. In the Criminal Procedure Law [Consolidated Version] 5742/1982 (here in after, *the law*), subsequent to section 143a shall come:

143b (a) “Sulha process”— an alternative process to a criminal process or a part thereof, established in a procedure, that is conducted before a Sulha council for the purpose of settling the conflict between the offender and the victim of the offense and whose purpose, inter alia, is restoration of the injuries of the victim of the offense, the community, or society that were caused by the offender; to instill peace and conciliation between the parties to the offense; and to buttress social solidarity. Restoration of the injuries is expressed principally by satisfaction of social and material needs of the victim of the offense; assurance of the security, stability, values, and wellbeing of the community or society; acceptance by the offender of full responsibility for the criminal act; and reintegration of the offender in the community or society. Mutual consent is the rule for normative submission in this process.

“Procedure”—a procedure that has been established under the provisions of subsection (d).

“Sulha council”— a group of people as established in the procedure.

(b) A duly authorized officer shall be authorized to divert a person suspected of committing an offense to a Sulha process, which shall be conducted in accordance with the provisions of the procedure, provided that all of the following conditions are fulfilled:

(1) The suspect has consented in writing to participate in a Sulha process, following his being informed by the authorized officer of the nature of the process, including the significance of his consent to participate in the process and the anticipated ramifications of the process on his legal status, in language and in a manner that are comprehensible to him, considering his personal circumstances;

(2) The suspect accepts responsibility for the criminal act.

(c) At the conclusion of the Sulha process, whether it has been completed in accordance with the provisions of the procedure or has not been thus completed, the chairperson of the Sulha council responsible for conduct of the Sulha process shall submit to the police a report on the Sulha process and the recommendation of the Sulha council concerning the offender. Completion of the Sulha process shall constitute a central and decisive consideration in any decision regarding the continuation of the criminal process concerning the offender, and if he has not yet been put to trial, no decision shall be made to put him to trial, unless the district attorney or his representative finds that doing so is justified by special reasons, which shall be given in writing.

(d) The Minister of Public Security shall, with the consent of the Minister of Justice, establish a procedure, to be published in *Reshumot*, regulating the types of criminal processes for which Sulha processes are appropriate and including, inter alia, provisions regarding the following:

- (1) The considerations and terms for diverting an offender to a Sulha process;
- (2) The threshold conditions for conduct of a Sulha process;
- (3) The Sulha council, its composition, the qualifications required to serve as a Sulha council member, and the manner of its appointment;
- (4) The confidentiality of anything said or submitted in a Sulha process;
- (5) The outcome of completion or non-completion of the Sulha process.

## 2. Amendment of Section 149

In section 149 of the law, subsequent to subsection (10) shall come:

(11) If a Sulha process, as defined in section 143b of the present law, is conducted and concludes with the signing of a Sulha agreement:

## 3. Amendment to Penal Law

In the Penal Law 5737/1977, section 340 shall be marked 340(1) and subsequent to it shall come:

340(2) If the court establishes the appropriate scope of punishment in accordance with the guiding principle and then finds that a Sulha process has been conducted and a

Sulha agreement has been signed between the guilty party and the victim of the offense, it shall deviate from the appropriate scope of punishment and shall substantially ease the penalty of the guilty party.

4. Amendment to Criminal Procedure Law (Enforcement Powers: Detention)

1. In section 13 of the Criminal Procedure Law (Enforcement Powers: Detention) 5756/1996, subsequent to subsection (b) shall come:

(c) If a Sulha process, as defined in section 143b of the law, is conducted and a Sulha agreement is signed between the party accused of committing the offense and the victim of the offense, it shall be presumed that there no longer are grounds for detention of the suspect.

2. In section 21 of the Criminal Procedure Law (Enforcement Powers: Detention) - 1996, subsequent to subsection (a)(1)(c) shall come:

(d) Notwithstanding the provisions of subsections (a) through (c) above, if a Sulha process, as defined in section 143b of the law, has been conducted and a Sulha agreement has been signed between the accused and the victim of the offense, it shall be presumed that there no longer are grounds for detention of the accused.

5. Amendment to Conditional Release from Imprisonment Law

In section 9 of the Conditional Release from Imprisonment Law 5761/2001, subsequent to subsection (h) shall come:

(i) If a Sulha process, as defined in section 143b of the law, has been conducted and a Sulha agreement has been signed between the prisoner and the victim of the offense:

**Explanatory Notes**

The present bill seeks to incorporate the Sulha process in all stages of the Israeli criminal process: the investigative stage prior to indictment, the stage following indictment, that of sentencing (establishing a punishment), and the stage of conditional release from imprisonment under a decision of the parole commission.

It is proposed that the Sulha process be entrenched in a procedure whose details shall be established by the Minister of Public Security with the consent of the Minister of Justice

and that shall include, inter alia, considerations, conditions, and arrangements for diverting an offender to a Sulha process; threshold conditions for conducting the process; and provisions concerning the Sulha council.

At the core of the bill is an attempt to confront the offender in an alternative and appropriate manner, with the assumption that the formal criminal process in Israel is not always an appropriate and just solution for all of the actors involved with it (the offender, the victim of the offense, and the community or society). In recent years, the status of the victim of the offense has become continually greater in the criminal process and alternative processes to the criminal process, such as criminal mediation, have developed. Some time ago, the Crime Victims Rights Law 5761/2001 was passed. In 2006, the Penal Law 5737/1977 was amended and a procedure—the criminal mediation process—was set for preliminary hearings (section 143a of the Penal Law).

Further, with regard to a minor who is involved in a criminal act, there is as of 2012 an alternative process to the criminal process (section 12a of the Youth Law (Judgment, Punishment, and Methods of Treatment) 5731/1971).

The dominant philosophical and legal view today is that the victim of the offense is a party to the criminal process and the criminal process should be settled in accordance with the restorative justice model, whose purpose is optimal restoration of the injuries caused by the criminal act, including all of its human consequences. Sulha, which is based upon the restorative justice model, is not entrenched in Israeli legislation despite the fact that the courts and parole commissions in Israel have established in a great number of decisions that it is a component of the criminal process and constitutes one of the considerations concerning detention, punishment, and early release.

A recently completed academic study shows that the majority of the public is interested in incorporation of Sulha in the Israeli criminal process. There is no doubt that incorporation of Sulha in the criminal process, in accordance with a procedure to be established by the Minister of Public Security with the consent of the Minister of Justice—the present proposal—is constitutional, promotes exercise of human rights, and is in accordance with the idea of liberal-constitutional democracy. It maximizes the aggregate social benefit and reduces the cost of the response to criminal acts.

It has historical and social roots: it is supported by the majority of the public and modern schools of thought on the criminal process, such as those of restorative justice, ADR, abolitionism, communitarianism, and victims' school.

In practice ,Sulha is today brought to bear in the criminal process in appropriate instances and under the conditions that have been established by the courts and parole commissions, concerning detention, punishment, and early release.

The present proposal also will strengthen public confidence in the legal system and in judges. It will decrease the caseload of the courts; improve the work of judges; and serve the cause of justice, which is the purpose of law.

Incorporation of Sulha in the Israeli criminal process facilitates implementation of various better-suited and more just techniques and solutions for the criminal act, which strengthens society and the legal system and powerfully buttresses the three pillars of the world: justice, truth, and peace.

**Appendix G: Letter of the President of the 14<sup>th</sup> Conference of Israel Bar Association.**



לשכת עורכי הדין בישראל  
ISRAEL BAR ASSOCIATION  
نقابة المحامين في إسرائيل

June 12, 2015

**His Honor Mr. Shakieb Serhan**  
**Nazareth Magistrate Court**  
**Nazareth**

Dear Sir,

**Re: presentation of scientific academic study performed by Your Honor at the fourteenth annual conference of the Israel Bar Association, conducted in Eilat, concerning “The Legal Status of Sulha in Israeli Criminal Law”**

1. The fourteenth annual conference of the Israel Bar Association featured the participation of hundreds of judges and attorneys from Israel and abroad and dozens of panel discussions of legal, professional, civic, political, and international issues.
2. Attendees of the fourteenth annual conference listened most attentively and most appreciatively to your study concerning an issue of great importance in eastern/Arab society: Sulha and its legal status in Israeli criminal law.
3. Notably, participation in the panel in which you presented the results of your aforementioned study was lively and considerable, and judges from all echelons of the court system listened carefully to your study and its outcomes. These were in addition to attorneys and journalists who commented favorably on the study, its quality, and the importance of presenting the various secondary issues associated with that of Sulha.
4. Moreover, many panel participants asked me to contact Your Honor with a request to bring the results of the aforementioned study to upcoming annual conferences as

well as to professional and other forums, and I have reason to believe that Your Honor will accede to such a request.

5. It may be stated without doubt that Your Honor's study received favorable, pertinent, and serious responses accompanied by a great deal of appreciation and esteem for the study and its scientific, legal, and academic outcomes.
6. Moreover, the study presents information, findings, and issues of public legal significance of the first order, all thanks to your weighty and intensive academic work.
7. Notably, the study and its publication will assist researchers, jurists, judges, academics, and scientists.
8. I would take this opportunity to express my appreciation and esteem for the performance of this highly important study and its outcomes, which have personally helped me to gain a professional understanding of important issues in the world of traditional criminal law, as well as how Sulha gained entrance to the world of Israeli criminal justice, and to this I add that I believe your study will lead those engaged with Sulha work to greater involvement in avoidance even of conflicts of criminal nature.
9. May you go on to much academic legal activity, building further on your highly importance work on the aforementioned study.

With appreciation and best wishes,



**Adv. Zaki Camal**  
President, 14<sup>th</sup> Conference of  
the Israel Bar Association  
Deputy Chairman, Bar Association